United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1110

To be argued by
JAMES E. NESLAND

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1110

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOSEPH STASSI, a/k/a JOE ROGERS, ANTHONY STASSI and WILLIAM SORENSON,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Joseph Stassi, Anthony Stassi and William Sorenson appeal from judgments of conviction entered on February 26, 1976 in the United States District Court for the Southern District of New York, after a six week trial before the Honorable Whitman Knapp, United States District Judge, and a jury.

Indictment 75 Cr. 502, filed on May 23, 1975, charged the three appellants and four others—Jean Claude Otvos, Jean Guidicelli, a/k/a the Uncle, Carmine Consalvo and Charles Alaimo—in five counts with violations of the

federal narcotics laws.* Count One charged all seven defendants and various co-conspirators with engaging in a conspiracy during the period January 1, 1970 through December 30, 1972 to violate former Sections 173 and 174, and presently existing Sections 812, 841(a)(1), 841(b)(1)(A), 941(a)(1) and 952, of Title 21, United States Code, by importing heroin from France into the United States and distributing it here.** Counts Two and Three charged all seven defendants with importing and selling approximately 40 kilograms of heroin in September, 1970; and Counts Four and Five charged them with importing and distributing approximately 70 kilograms of heroin in June, 1971.

Trial commenced on October 14, 1975 as to defendants Joseph and Anthony Stassi, William Sorenson and Charles Alaimo and concluded on November 21, 1975 when the jury returned a verdict finding appellants guilty on all counts.*** On February 26, 1976 Judge Knapp imposed sentence. Joseph Stassi was sentenced to a term of imprisonment of 30 years, a special parole term of six

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* Indictment 75 Cr. 502 superseded Indictment 75 Cr. 395, filed on April 17, 1975; Indictment 75 Cr. 395 superseded Indictment 73 Cr. 405 which was filed and sealed on April 30, 1973. Indictment 73 Cr. 405 was a two-count indictment charging appellant Anthony Stassi alone with importation of 40 kilograms of heroin in September, 1970.

** A total of 35 co-conspirators were named either in the indictment or in the Government's bills of particulars.

*** A mistrial was declared as to defendant Charles Alaimo on November 21, after the jury reported itself unable to reach a verdict as to him. Defendant Carmine Consalvo died one month before trial as a result of a fall from an upper floor of a high-rise apartment house in Fort Lee, New Jersey. Defendants Jean Claude Otvos and Jean Guidicelli were and remain fugitives.

years, and was fined $160,000.* Anthony Stassi was sentenced to a term of imprisonment of 25 years, a special parole term of three years, and was fined $110,000.** William Sorenson was sentenced to a term of imprisonment of 25 years and a special parole term of 20 years.***

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* The precise sentence imposed on Joseph Stassi was 30 years imprisonment on Counts One, Two and Three, each to run concurrently with the other, and 15 years imprisonment on Counts Four and Five, each to run consecutively to the other but concurrently with the sentences imposed upon Counts One through Three. The fines imposed were $20,000 on each of Counts One, Two and Three, and $50,000 on each of Counts Four and Five.

** The precise sentence imposed on Anthony Stassi was 20 years imprisonment on Counts One, Two and Three, each to run concurrently with the other, and 5 years imprisonment on Counts Four and Five, each to run concurrently with the other but consecutively to the sentences imposed upon Counts One through Three. The fines imposed were $20,000 on each of Counts One, Two and Three, and $25,000 on each of Counts Four and Five.

*** The precise sentence imposed on William Sorenson was 20 years imprisonment on Counts One, Two and Three, each to run concurrently with the other, and 5 years imprisonment on Counts Four and Five, each to run concurrently with the other but consecutively to the sentences imposed upon Counts One through Three. A 10 year special parole term was imposed under Counts Four and Five to run consecutively with each other. Judge Knapp imposed a 20 year special parole term for the express reason that, unlike Joseph and Anthony Stassi, Sorenson may live long enough to be released from prison and society needed protection from that likely event. (Tr. of Sentencing, February 26, 1976, at 4129-30).

Statement of Facts

The Government's Case

A. Synopsis.

The Government's proof at trial showed that the appellants established a heroin pipeline through which they successfully smuggled almost one-half ton of pure heroin from France to the United States for distribution here.

Beginning in early 1970 and ending in late 1973,* appellants, utilizing a "French connection" developed at the United States Penitentiary in Atlanta, Georgia, arranged for five major heroin shipments to be smuggled from France to New York City, four of which were successfully completed: the first shipment arrived in New York in September and October, 1970, and consisted of approximately 120 kilograms, delivered in two parts; the second shipment arrived in New York in November and December, 1970, and consisted of approximately 140 kilograms, delivered in two parts; the third shipment arrived in New York in June, 1971, and consisted of approximately 80 to 90 kilograms; and the fourth shipment arrived in New York sometime in June, 1972, and consisted of a large but unspecified quantity.

The principal Government witnesses were Mario Perna, Anthony Verzino, Joseph Condello and Michel Mastantuono. Perna, Verzino and Condello had been in-

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* The Government's evidence at trial involved the years 1970 through 1973. The Government refrained from adducing evidence of appellants' 1974 plans involving undercover police officer Nicholas Molfetta, a witness at trial, to import between 100 and 125 kilograms of heroin from France to Miami, Florida. (See GX 3507(a)-(d)).

mates with Joseph Stassi, Sorenson and Otvos in the United States Penitentiary in Atlanta, Georgia. Mastantuono, on the other hand, had been a courier for Jean Guidicelli's French narcotics organization in Marseilles. Mastantuono knew neither Perna, Verzino nor Condello.

B. The American Operation.

1. The proposal to import heroin.

The operation of the smuggling conspiracy in the United States was principally established through the testimony of Perna, Verzino and Condello. Their testimony revealed that in January or February 1970, Otvos, a French heroin smuggler incarcerated in the Federal Penitentiary in Atlanta, Georgia,* proposed to Perna and Verzino that his organization in France, headed by "The Uncle", had available large quantities of heroin for importation into the United States which Perna and Verzino could purchase provided they had an outside organization capable of receiving and distributing the narcotics. (Tr. 76-81, 84, 1318-22).**

Perna and Verzino discussed the proposal between themselves, and Verzino suggested proposing the deal to inmate Joseph Stassi ("Joe"), a convicted heroin smug-

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* Otvos had been convicted in the Eastern District of New York in 1967 for importing 5 kilograms of heroin from France into the United States. He was sentenced to serve a term of imprisonment of 14 years. (Tr. 46-47).

** Otvos made the proposal to Perna and Verzino as a result of problems he was then having with prison inmate Ralph Santana, who owed money for 90 kilograms of heroin imported into New York, which had been arranged by Otvos and his partner, Joseph Lucarotti. (Tr. 76-81, 1318-22, 1324). Santana was convicted in 1974 for his use of this French connection in the Atlanta Penitentiary in *United States* v. *Santana*, 503 F.2d 710 (2d Cir.), *cert. denied*, 419 U.S. 1053 (1974).

gler.* Verzino told Perna that Joe Stassi had a brother, Anthony Stassi ("Tony"), who could make the necessary arrangements "on the outside." (Tr. 86-87).

2. The proposal is accepted.

Verzino met with Joe Stassi and outlined Otvos' proposition. Joe readily agreed to have his brother Tony visit the Penitentiary. (Tr. 87-88; 1323-24). Joe Stassi asked Verzino to meet with Otvos in the meantime to arrange the mechanics for Tony to meet Otvos' people in France.

Verzino met with Otvos, and Otvos gave Verzino the name and address of Otvos' brother Gerard in Paris, France, who was to be the contact man for Tony Stassi. Otvos also provided Verzino with an unsigned handwritten note which Tony was to give to Gerard and which vouched in coded terms for Tony. Verzino delivered the address and the handwritten note to Joe Stassi, who in turn smuggled them into the penitentiary visiting room and gave them to Tony Stassi on March 9, 1970. Tony agreed to go to France to make the arrangements with Otvos' people. (GX 60; Tr. 88-92, 1324-33).

Following Tony Stassi's visit, Perna and Verzino discussed possible customers for the heroin shipments, among them Patsy and Ernie Malizia, known as the Pontiac brothers, and Louis Cirillo.** Verzino supplied these cus-

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* Joe Stassi was convicted in 1967 for importing 100 pounds of heroin from Mexico into Texas, destined for New York. See *United States* v. *Stassi*, 410 F.2d 946 (5th Cir. 1969).

** Cirillo was convicted in 1972 of a conspiracy to import heroin from France into New York. One of the three French couriers named in that case as delivering heroin for Cirillo was Mastantuono, a witness for the Government at the trial below. *United States* v. *Cirillo*, 468 F.2d 1233 (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973).

tomers' names to Joseph Stassi to give to Tony. (Tr. 92-93, 1334-35). Verzino and Perna then discussed between themselves recruiting someone to work for them on the outside with Tony Stassi. Verzino attempted unsuccessfully to recruit his friend Vincent "Red" Marconi; Perna, in turn, asked prison inmate William Sorenson, who was then scheduled for release on March 26, 1970.* Sorenson agreed. (Tr. 95-100, 1336-38).**

3. The trip to France.

In April or May 1970, Tony Stassi visited Joe and reported on his trip to France. Tony told Joe that Gerard Otvos had made the appointment for Tony to meet with Otvos' people. Although initially relunctant to do business, Otvos' people agreed when Tony mentioned to them that Paul Mondiloni was Joe Stassi's old partner.*** They agreed to deliver heroin to Tony at a price of $10,000 to $11,000 per kilogram, and made arrangements with him to meet in New York in the near future. (Tr. 101-03, 1338-40).

Upon learning of the success of Tony Stassi's negotiations in France, Verzino and Perna turned to their own interests. First, they discussed with Joe Stassi how they

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* Sorenson was ordered released on March 26, 1970 as a result of the reversal of one of the two counts of which he was convicted in the Eastern District of New York in 1962 for importation and possession of 3 kilograms of demerol, having already completed serving his New York State sentence of 10 to 30 years for 1st degree manslaughter.

** Condello, who bunked in the same penitentiary dormitory as Verzino, Perna and Sorenson, heard Perna and Verzino giving instructions to Sorenson to prepare him for his tasks in assisting Tony Stassi make deliveries of the imported heroin and in taking care of Perna's and Verzino's share of the heroin. (Tr. 770-78).

*** Paul Mondiloni was the French connection for the 100 pounds of heroin imported by Joe Stassi and for which he was convicted in Texas in 1967. *United States* v. *Stassi, supra.*

would share in the heroin shipments and eventually arrived at an agreement whereby they would receive 2 kilograms of heroin for every 100 kilograms imported, plus an option to purchase additional kilograms on credit. (Tr. 93, 1340-41). Perna and Verzino then made arrangements on the outside through Verzino's girlfriend, Susan O'Neil, to have Sorenson and her receive their share of the heroin, dilute and sell it, and reinvest the profits in the purchase of additional kilograms. (Tr. 106-07, 1343-44).*

When a couple of months went by without news of any heroin shipments, Verzino approached Otvos and inquired about the delay. Otvos showed Verzino a card, postmarked Watertown, New York, and assured Verzino it meant that Otvos' people were then waiting for the heroin shipment to arrive in Canada. (Tr. 1345-46).

4. The first shipment arrives.

In late September or early October, 1970, Tony Stassi visited Joe at Atlanta with the news that 120 kilograms of heroin had been successfully smuggled into New York in a two-part load; 40 kilograms in the first part;** and 80 kilograms in the second. Tony related that the Malizia brothers had purchased and paid for the first part of the shipment on the spot and within hours had purchased and paid for the second part of the shipment. Joe Stassi told Perna and Verzino that the only problem with the

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* Throughout 1970 and into 1971 Verzino wrote coded letters to Susan giving her instructions with respect to receiving and disposing of the heroin. Several of these letters were admitted into evidence. (GX 20-30, 33).

** The first part of the shipment of 40 kilograms was smuggled into New York City by Mastantuono on September 27, 1970 and the next day delivered to Tony Stassi, Sorenson and defendants Charles Alaimo and Carmine Consalvo. See *infra* at 22-23.

entire deal was that the Malizias had sent someone named Albaduce, who Perna and Verzino knew to be Albert Pierro,* to deliver the money to Tony Stassi and pick up the heroin. However, Pierro couldn't drive the automobile containing the heroin, and Tony Stassi had to drive it to 117th Street and Pleasant Avenue for delivery to the Malizias. Joe Stassi told Perna and Verzino that Tony had been told by the Frenchmen to expect a larger shipment very soon. (Tr. 110-12, 115, 1347-48).**

On the same day Tony Stassi visited Joe with the news of the shipment, Verzino's girlfriend Susan made a simultaneous visit to Atlanta to tell Verzino that Sorenson had delivered his two kilograms of heroin to her but had refused to assist her in diluting and selling it.*** Susan told Verzino she had already sold one kilogram to her brother-in-law, William Bentventna. Verzino instructed Susan to dilute the second kilogram of heroin with mannite and sell the diluted heroin to Cuzzie Suarez.**** Verzino further instructed Susan to get all the money she could together to reinvest in the next expected heroin shipment. (Tr. 113, 119-21, 368-69, 1347-51).

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* Albert Pierro was convicted in 1972 of a conspiracy to possess and distribute 35 kilograms of pure heroin secreted in wine bottles found in an automobile and at Pierro's New Jersey home. See *United States* v. *Christophe*, 470 F.2d 865 (2d Cir. 1972), *cert. denied*, 411 U.S. 964 (1973).

** Flushed with success after the first shipment, Perna boasted to Condello that everything was going well; they had recently received a shipment of 100-150 kilograms of heroin from France. (Tr. 779-80).

*** The visiting records for Joe Stassi and Verzino at the Atlanta Penitentiary reflected that on October 2, 1970 Tony Stassi visted Joe and Susan O'Neil visited Verzino. (GX 60, 62).

**** Cuzzie Suarez was later introduced to Perna, who married her upon his release from the Atlanta Penitentary in May, 1972. She and Perna were subsequently convicted in the Southern District of Florida for a conspiracy in 1972-73 to import cocaine from South America. (Tr. 232, 338-42, 368-69, 436-38).

5. The second shipment arrives.

In November or December, 1970, Tony Stassi visited Joe at Atlanta with news that another two-part shipment of 140 kilograms of heroin had been received and sold to the Malizias. Tony advised Joe that a third shipment could be expected by Christmas. (Tr. 120-22, 1352-56).

Verzino's girlfriend Susan also visited at Atlanta to tell Verzino of the same shipment. Susan told Verzino that Sorenson had delivered four kilograms of heroin to her—two kilograms as Perna's and Verzino's commission and two kilograms which she purchased for $14,000 a piece.* In addition, Susan told Verzino that she had cut her brother-in-law Bentventna into the shipment for five kilograms, out of which she was to earn $1000 per kilogram. Susan complained, however, that Sorenson had taken $2,500 of the $5,000 paid by Bentventna, claiming it was his share of the Bentventna sale. (Tr. 1322, 1352-53).** Susan also informed Verzino that Sorenson was out "putting on the dog" displaying a gold lighter given to him by one of the Frenchmen. (Tr. 1334).***

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* Perna was never told by Verzino of the two kilograms which Susan purchased with the proceeds of the sale of the heroin from the first shipment. (Tr. 122).

** Verzino complained about the matter to Joe, and, sometime later, Tony Stassi took Sorenson to Susan's apartment and made Sorenson pay her the $2500. (Tr. 1353).

*** Whatever luster Sorenson's gold lighter had as a gift from the Frenchmen was outshined by its evidentiary value to the government when an identical gold lighter was identified by Perna and Condello as Sorenson's lighter. In fact, the gold lighter Perna and Condello identified was one of two matching gold lighters Mastantuono purchased in Paris, France. Mastantuono purchased one of the lighters for himself and the second for Jacques Bec to give to the American customer for heroin. (GX 2; Tr. 2154-56).

6. Dissension in the ranks.

Months went by during which Verzino and Perna were told that no more heroin shipments were being received.* However, the problems with Sorenson continued. In late 1971, Joe Stassi told Verzino that Sorenson nad lost $260,000 of Tony's money, which Sorenson excused by claiming it belonged to Perna and Verzino. (Tr. 1357-59).** They also heard Sorenson was spending a lot of money and drawing attention to their business. (Tr. 137). ***

Joe Stassi and Perna also began complaining to each other about Verzino's actions inside the penitentiary. Since the lull in the heroin shipments had set in, Verzino had begun circulating around the penitentiary speaking to Frenchmen and South Americans about importing narcotics through their contacts, dropping Stassi's and Otvos' names as references. They also complained that Susan, an alcoholic, was getting drunk and talking about their business on the outside. (Tr. 133-36).

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* What Perna and Verzino were being told was not in fact happening. In June 1971, Mastantuono delivered 80 or 90 kilograms to Tony Stassi and Sorenson at Albert Pierro's home in New Jersey. *Infra*, pp. 24-26. What Perna and Verzino were being told was that the expected heroin shipments were being seized and delayed. (Tr. 125-26, 1363).

** True to form, Verzino never told Perna of this $260,000. Perna learned of it only after his release from the Atlanta penitentiary, when Tony Stassi demanded to know if Sorenson owed Verzino and Perna $200,000 or $250,000. Ignorant of the matter, Perna assured Tony that Sorenson owed them nothing. (Tr. 169-71).

*** Perna wrote a letter to Condello in 1972, while Condello was temporarily imprisoned at Lexington, Kentucky, telling him that Sorenson was "screwing up" the business on the outside. (Tr. 780-81).

In May, 1972, when Perna was scheduled to be released from prison, Perna met with Joe Stassi to consider what should be done about Verzino, his girlfriend and Sorenson. Joe instructed Perna to murder Sorenson and Susan upon his release and to send poison to Joe in the penitentiary and he would have Verzino murdered there. Joe cautioned Perna that Verzino should be murdered before the girlfriend; otherwise, Verzino might run to the authorities.* Joe further instructed Perna to meet with Tony, who would help Perna kill Susan and Sorenson. (Tr. 133-40, 162-64). Perna, of course, would replace Sorenson in the business. (Tr. 1360-61).

7. Perna is released.

On May 5, 1972, Perna was released from the Atlanta Penitentiary. He met with Susan and received $40,000 in cash. (Tr. 164-66).** Perna then met with Tony Stassi outside the Yeager House at 85th Street and Lexington Avenue. Tony asked Perna at the outset if Sorenson owed Verzino and him $200,000 or $250,000. When

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*Sometime later, Condello, who eventually helped Perna try to gun down Sorenson in Brooklyn, heard Joe Stassi talking in the penitentiary with inmate Thomas Kapotas about the fact that Perna had not sent the strychnine to kill Verzino. Joe stated:

> "Maybe it is for the best that Verzino doesn't get killed right now because his girlfriend Suzie is out on the street and she knew everything about the whole narcotics business . . . she could just . . . spill her guts if something happened to him inside."

Condello also heard Kapotas assure Joe Stassi in that conversation that, when released, Kapotas would kill Sorenson for losing money for a heroin shipment. (Tr. 785).

** Perna was to receive $80,000 as his share, but he was told by Verzino upon his release that Susan had used up much of Perna's money. (Tr. 165). By Verzino's original calculations, Perna should have earned $160,000, one-half of the $320,000 which Verzino initally told Perna they would earn from diluting the four kilograms of heroin into 16 kilograms, which could be sold for $20,000 a piece. (Tr. 322-24).

Perna replied that Sorenson owed them nothing, Tony made an appointment to meet Perna the next week at the Casa del Monte restaurant on West 72nd Street.

At the Casa del Monte, Perna asked Tony Stassi about any heroin shipments. Tony told Perna he would let Perna know about the arrival of any future shipments. Perna then asked Tony if he could see Sorenson, and Tony arranged an appointment for Sorenson to meet Perna the next week at Casa del Monte. (Tr. 170-72).

Both Tony Stassi and Sorenson came to the Casa del Monte to meet Perna the next week, sometime in June, 1972. Tony again asked Perna in front of Sorenson about the $250,000 debt and Perna gave the same negative reply. Tony then left, and Perna and Sorenson drove together to Brooklyn. Enroute, Perna complained to Sorenson about all the problems Sorenson had caused everyone during the past couple years. Sorenson denied everything. Sorenson then showed Perna a gold lighter which, Sorenson boasted, was presented to him by one of the Frenchmen as a gift. (GX 2; Tr. 172-78).*

In July, Perna met again with Tony Stassi alone at the Casa del Monte. At this meeting Perna asked Tony whether Joe had spoken to him about the planned killing of Sorenson and Verzino's girlfriend. Tony told Perna he had talked to his brother, and he would help Perna kill Verzino's girlfriend. As to Sorenson, Tony said he

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* Appropriately, Sorenson presented Perna with a gift of a gold watch that same evening. The watch was broken, but Sorenson assured Perna that if Perna had it repaired, it would work. Sorenson also graciously gave Perna the name of a Madison Avenue tailor and told Perna to get fitted for some suits. However, Sorenson later complained when Perna ordered six suits and Tony Stassi had to take care of the $2,400 bill. (Tr. 177-81, 190).

would not help Perna kill him but he would not stand in his way. (Tr. 180-82).*

Perna also asked Tony about any heroin shipments, and Tony told him that he had received a shipment just a month before. When Perna complained to Tony about being excluded from the shipment, Tony simply told Perna that the shipment had been committed to others before Perna was released and Perna could handle the next heroin shipment, which Tony expected in September or October, provided Perna had the outlets to dispose of it. Perna assured Tony that he had the requisite organization to dispose of any shipment. (Tr. 182-84).

In September, 1972, Perna made several attempts to contact Tony Stassi about the expected heroin shipment. Finally, Tony left Perna a message to meet him at the Casa del Monte. Before Perna went to the restaurant, he sent Condello ahead to sit at the bar to cover Perna's back.** Perna then met with Tony, and this time Tony told Perna that he was about to travel to France to resolve some problems with the pending shipment and would contact Perna upon his return. After Tony left the restaurant, Perna and Condello also left. Perna confided to Condello that Tony expected a heroin shipment soon and Perna would sell a few kilograms to

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* Tony Stassi told Perna: "Bubby [Sorenson] and I always got along all right. We have had our differences but I don't really have any problems with Bubby. *** [However,] I am not married to Bubby but Bubby is married to me. *** Whatever you feel you want to do with Bubby, if you have a personal thing with him, that is up to you." (Tr. 182).

** Condello was first released from Atlanta in September, 1972. When he met first with Perna, Perna told him he was then waiting for Tony Stassi to contact him about an expected heroin shipment; Perna told Condello that the purpose of the meeting with Tony at the Casa del Monte was to learn what had happened to that shipment. (Tr. 790-92, 810-12).

Condello. Perna also confided that Tony had confirmed to him that Sorenson could be killed without any risk of retaliation. (Tr. 188-91, 810-12).

Either the following month, or in November, 1972, Perna contacted Condello and another former prison inmate, Danny Grillo, and asked them to assist him in the killing of Sorenson. The three drove to the Bronx, picked up two pistols, and went to Del Monico's Bar in Brooklyn, where Perna and Condello met with Sorenson.* Grillo remained outside in the car. Perna and Condello engaged Sorenson in a conversation and learned that he was leaving the bar soon to go to his girlfriend's house in Brooklyn. Perna and Condello left, and with Grillo, they drove to the girlfriend's house. There they lay in wait for Sorenson for several hours. When Sorenson failed to show, the three left. (Tr. 191-94, 792-99, 807-09).

8. Perna joins in partnership with Malizia.

In February, 1973, Sorenson called Perna to come to the Evergreen, Sorenson's bar in Brooklyn, to meet an old friend. Again accompanied by Condello, Perna went to the Evergreen where he met the old friend, Ernie Malizia.** After some discussion, the two men agreed to become partners in the sale of narcotics. (Tr. 194-97, 813-14).***

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* It was at this meeting where Condello was first shown the gold lighter by Sorenson. Like Perna, he identified Mastantuono's gold lighter as Sorenson's lighter; but, unlike Perna, Condello knew nothing concerning how Sorenson had obtained the lighter. (Tr. 832-36).

** Malizia was a fugitive from a 1971 indictment at the time and was using the pseudonym, Harry Luppes. (Tr. 195).

*** In that conversation, and subsequent conversations, Malizia told Perna about what had happened on the outside while Perna was in Atlanta. Malizia confirmed that he and his brother had received two heroin shipments, one in October, 1970 and the other in December, 1970. Malizia complained, however, that in

[Footnote continued on following page]

After joining with Malizia, Perna made several efforts in the same month to contact Tony Stassi. He finally succeeded in making an appointment to meet with Tony at the Casa del Monte. Perna and Malizia both went to the restaurant. Upon seeing Malizia, a fugitive, Tony warned him to leave because Tony believed he was under heavy surveillance.* Malizia left. Perna asked Tony about the heroin shipment. Tony related that he had recently traveled to Mexico for heroin, but he refused to buy the heroin because the processing techniques used in Mexico were inferior to those in Europe. Although Perna expressed his willingness to accept Mexican heroin, Tony informed Perna that he was about to leave for France and would try to negotiate for a heroin shipment for Perna and Malizia there. Before leaving the restaurant to meet Malizia outside, Tony informed Perna that Joe had sent word for them not to kill Sorenson or Verzino's girlfriend. (Tr. 200-05).

Two weeks later, in March, 1973, Sorenson telephoned Perna and told him to meet Tony Stassi at Brione's restaurant in Brooklyn. That night, Perna and Malizia drove to Brione's and met with Tony and Sorenson. Tony informed them that he had been to France and the Frenchmen were willing to make monthly deliveries of 20 to 30 kilograms of heroin to Canada. Tony informed Perna and Malizia that they would have to smuggle the heroin from Canada into New York and that the price per kilogram would be $19,000 or $20,000. Perna and Malizia

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February 1971 he "went on the lam" because of his indictment and left their narcotics business and one half million dollars in the hands of Albert Pierro to purchase the next heroin shipment. Subsequently, Malizia told Perna, he discovered that Pierro had used up the money to purchase several heroin shipments, all without Malizia's knowledge, and had lost the half million dollars. (Tr. 197-200).

* Joe Stassi complained to Verzino in Atlanta that Perna had brought Malizia to meet Tony Stassi. (Tr. 1364-65).

expressed their agreement, and Tony told them he would return to France to finalize the deal. (Tr. 205-07, 213-16).*

The next month, April, 1973, Sorenson again telephoned Perna and instructed him to meet Tony Stassi at a diner in Brooklyn. Malizia was familiar with the diner, and he and Perna drove there. Tony told them he had made the arrangements for 20 kilograms at a price of $21,000 or $22,000 per kilogram. Perna and Malizia were to front the money in full to Sorenson, who would take it to the Frenchmen in Canada, take possession of the heroin, and deliver it to Perna and Malizia in Canada. (Tr. 216-19).**

During the next few months neither Perna nor Malizia heard from Tony Stassi. Perna and Malizia made several trips to the Evergreen to meet Sorenson, who told them that he had not heard from Tony either. (Tr. 219-24). Perna and Malizia made their final effort to contact Tony Stassi about the heroin shipment to Canada in December, 1973, when they went to Miami, Florida. They were not successful. (Tr. 227).***

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* About this same time, back in the Atlanta Penitentiary, Joe Stassi asked Verzino's opinion about Tony accepting an offer from the Frenchman to smuggle the heroin only as far as Canada. Verzino expressed the view that Tony should reject the offer in favor of paying one or two thousand more per kilogram for New York delivery. (Tr. 1363-64).

** During that conversation, Sorenson complained to Tony Stassi that the price per kilogram Tony quoted to Perna and Malizia was too low; Sorenson told Tony that a higher price could be asked and gotten from others. When Perna began to curse Sorenson, Tony instructed Sorenson to be quiet. (Tr. 218-19).

*** In August, 1973 Verzino was released from Atlanta and immediately joined Perna and Malizia selling heroin in New York. Before his release, however, Verzino had agreed with Joe Stassi

[Footnote continued on following page]

Meanwhile, in September, 1973, Condello was arrested. When released on bail, Condello had gone to the Evergreen and Sorenson arranged for him to go into hiding at Sorenson's apartment. While there, Sorenson told Condello that Tony Stassi was then in France arranging for another heroin shipment.* Sorenson also informed Condello that Perna was "cut out" of the shipment but Condello could purchase a few kilograms from Sorenson. (Tr. 818-21).

9. Condello begins to cooperate.

In October, 1973, Condello surrendered to the Drug Enforcement Administration and agreed to cooperate as an informant. Together with Special Agent James Bradley, Condello met with Sorenson and several times with Perna. In mid-November, 1973, Condello and Bradley met with Sorenson at the Evergreen. Condello asked Sorenson whether he had heard from Tony Stassi about the heroin shipment. Sorenson replied that Tony had gone to Atlanta to visit Joe about it, and Sorenson had not heard anything from Tony. (Tr. 823-24, 1099-1102).

On November 27, 1973, Condello and Bradley met with Perna at Romolo's Tavern in Fort Lee, New Jersey. Condello asked Perna if he had heard from Sorenson about the expected heroin shipment. Perna informed

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that Verzino would wait to hear from Tony Stassi about any heroin shipments from France. If Tony failed to make contact, Verzino informed Joe that he intended to contact the Frenchman on his own. Subsequent to his release, Verzino talked twice with Joe over the telephone, telling him that Tony had not made any contact and that Verzino planned to make his own deal. (Tr. 1364-73).

* Sorenson's telephone bill reflected two calls to Paris in August, 1973. (GX 45).

Condello that Joe Stassi had called off the shipment because Tony Stassi and Sorenson had wasted the funds to purchase the shipment. (Tr. 837-39, 1104-06). In subsequent meetings with Condello and Bradley in December, 1973, and January, 1974, Perna confirmed that the heroin shipment Tony Stassi had arranged from France for pick up in Canada had fallen through because Tony and Sorenson had wasted away the front money. (Tr. 839-43, 1107-16).*

C. The French Operation.

The operation of the smuggling conspiracy between France, Canada and New York was established through the testimony of Mastantuono and his fiancee, Danielle Ouimet.**

1. Mastantuono agrees to smuggle heroin.

Their testimony revealed that in May, 1970, Mastantuono, a bartender at the Chez Clairette in Montreal, Canada,*** was called by Jacques Bec, a French impresario, to fly to Paris. When Mastantuono went to Paris, Bec asked Mastantuono if he would be willing to purchase

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* The January 1974 conversation among Perna, Condello and Bradley was tape-recorded. The recording was admitted in evidence and a portion was played for the jury. (GX 5, 5A; Tr. 251-64).

** Although Mastantuono's and Ouimet's testimony revealed how the French end of the conspiracy operated, in reality it only provided a small glimpse of the overall operation in France, an operation previously reviewed in a number of other prosecutions. See *United States* v. *Cirillo, supra; United States* v. *Santana, supra; United States* v. *Kella*, 490 F.2d 1095 (2d Cir. 1974); *United States* v. *Hysohion*, 439 F.2d 274 (2d Cir. 1971).

*** Mastantuono was originally born and raised in Marseilles, France. He emigrated to Canada in 1969 and obtained employment at Chez Clairette as a barman. It was at the Chez Clairette that Mastantuono met Edmund Tailet and Jacques Bec, both French heroin smugglers. (Tr. 2108-10).

an automobile in Paris, have it loaded with heroin, and then have it shipped to Montreal. Bec informed Mastantuono that Bec would split his $1000 fee per kilogram with Mastantuono. Mastantuono agreed to consider the proposition. (Tr. 2110-13).*

From Paris, Mastantuono traveled to Cannes to meet with Danielle, who was at the Cannes Film Festival promoting her two movies, "Valerie" and "Initiation." From Cannes, Mastantuono traveled to Marseilles, where he again met with Bec and accepted Bec's proposition. Bec instructed Mastantuono to return to Paris and purchase a DS-21 Citroen. (Tr. 2114-16, 2687-88).

2. The Citroen is purchased.

Mastantuono and Danielle left Cannes and drove to Paris on May 29. In Paris, Bec met with Mastantuono and showed him a Citroen dealer on the Champs-Elysees. Bec instructed Mastantuono to purchase a Citroen from that dealer and, when notified by Bec, to take the Citroen down to Biarritz to be packed with heroin. On May 30, Mastantuono, accompanied by Danielle, walked to the Citroen dealer and Mastantuono ordered a DS-21 in Danielle's name. (GX 68; Tr. 2115-20, 2688-91).**

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* Bec informed Mastantuono that he was in need of Mastantuono's services because his partner Tailet had cheated Bec out of money, and Bec had ceased working with him for that reason. (Tr. 2114). Later, Mastantuono learned that Bec himself was not without sin. In addition to the $1000. fee per kilogram, which he was sharing with Mastantuono, Bec was receiving part of the heroin, which he was not sharing with Mastantuono.

** Mastantuono explained to Bec, who became upset to learn that the Citroen had been ordered in Danielle's name, that, unlike Danielle, a movie actress, Mastantuono was a low-salaried bartender who might be suspected if he were to purchase an expensive car and ship it from France to Canada. (Tr. 2119-20).

After ordering the C...oen, Mastantuono and Danielle left Paris for Brussels, where Danielle was then making a movie. While Danielle stayed in Brussels, Mastantuono returned to Montreal and then later traveled back and forth between Montreal, Paris, Marseilles and Brussels. (Tr. 2120-23, 2691-92).

In July or August, Danielle was notified that the Citroen had arrived in Paris. Mastantuono picked it up and drove it to Brussels. A short time later, Bec instructed Mastantuono to drive the Citroen to Paris. Mastantuono did so, and then returned to Brussels. Thereafter, Bec delivered the Citroen to Biarritz for loading. (Tr. 2123-26, 2693).

In late August, Mastantuono and Danielle traveled to Biarritz to pick up the Citroen. When they arrived, Mastantuono met with Bec; Bec told him that the mechanic had the car ready. Mastantuono and Danielle drove the Citroen non-stop to Paris and delivered it on September 9, 1970 to Transport Mondieux to be shipped to Montreal. They then left Paris and returned to Montreal to await the arrival of the Citroen. (GX 72, 73, 74; Tr. 2127-30, 2693-95).

3. The Citroen arrives in Montreal.

On September 21, 1970, the Citroen arrived in Montreal. Mastantuono and Bec sent Danielle to pick the car up. Mastantuono then drove the Citroen to Danielle's apartment and parked it in her garage. Inside the garage, he replaced the French license plates with Canadian plates. Bec arrived at Danielle's apartment, made several telephone calls to New York, and then instructed Mastantuono to take the Citroen to New York City. (GX 75, 76; Tr. 2130-33, 2696-97).

4. The Citroen arrives in New York.

Mastantuono told Danielle to drive the Citroen from Montreal across the Canadian border alone and meet him at a diner in Plattsburg, New York. Danielle did so, and from Plattsburg Danielle and Mastantuono drove the Citroen to Manhattan, arriving on September 27. Mastantuono parked the Citroen at Toots Shor's garage on West 57th Street and then checked himself and Danielle into the Abbey Victoria Hotel under Danielle's name. (GX 77, 78; Tr. 2133-35, 2697-99).

Early the next morning, between 4 a.m. and 6 a.m., Mastantuono met with Bec in the hotel lobby. They picked up the Citroen, and Bec instructed Mastantuono to drive it to 64th Street where they were to "wait for the man from Marseilles."

They circled the block several times until Bec spied a red Plymouth Charger parked on the street. He instructed Mastantuono to park the Citroen behind it. Bec and Mastantuono immediately left the Citroen and met with a Frenchman on the street, who Bec introduced as Andre Andreani. Andreani told them he was not ready yet and took them to wait at a nearby coffee shop.

A short while later, Andreani returned and told them to follow. Outside the coffee shop, Mastantuono saw Andreani meet with Tony Stassi at the corner. At that time, Tony Stassi handed Andreani a brown paper bag and the two of them entered the Plymouth Charger. Andreani circled the block once, then flashed the headlights signaling Mastantuono and Bec to follow. As Mastantuono pulled the Citroen in behind the Charger, three cadillacs immediately joined them. As they drove out of Manhattan into Westchester, the three Cadillacs each passed forward and back of the Citroen. Driving one of the Cadillacs was Sorenson. (Tr. 2135-41, 2145-46).

Sometime after the procession of cars had departed Manhattan, defendant Charles Alaimo, who was driving another of the Cadillacs, signaled Mastantuono to exit the highway and proceed to the Thruway Diner in Larchmont. At the diner, Andreani told Bec and Mastantuono that they had to wait until everything was ready.

Moments later, Andreani returned to the diner and told them: "It is ready. Let's go!" Bec and Mastantuono entered the Citroen and followed Andreani in the Charger. After circling around the village of Larchmont, Andreani stopped in front of a residence at 23 Holly Place and directed Mastantuono to enter the driveway at the side of the house. Mastantuono drove down the driveway to the rear of the house and maneuvered the Citroen into the garage. (GX 82, 83, 84; Tr. 2141-46).

5. The Citroen is dismantled.

Inside the garage, Andreani handed Bec and Mastantuono a layout of the Citroen and the brown paper bag which Andreani had received earlier from Tony Stassi. Inside the paper bag were specially-made Citroen tools and a chisel to dismantle the Citroen. Bec and Mastantuono took the Citroen apart and removed 80 one-half kilogram bags from the chassis and beneath the floor boards. Andreani separated the bags into four suitcases, which he and Tony Stassi then took to one of the Cadillacs. Sorenson opened the trunk of the Cadillac, and they placed the four suitcases inside. Bec and Mastantuono left in the Citroen and returned to Manhattan, where a few hours later Andreani delivered $40,000 to them in Bec's room at the Taft Hotel. (Tr. 2146-52).

The next day, Mastantuono and Danielle drove the Citroen back to Montreal with the $40,000 stashed in the spare tire. Back in Montreal, Bec and Mastantuono divided the $40,000—$22,000 for Bec and $18,000 for Mas-

tantuono.* Danielle later smuggled Bec's share into France. (Tr. 2151-54, 2703).

6. The purchase of the gold lighters.

Sometime after the Citroen delivery, Bec asked Mastantuono to purchase a gold lighter in France as a gift for an American customer. Mastantuono purchased two identical gold lighters—one for himself and one for Bec to give to the American customer. (GX 2; Tr. 2154-56).

7. The delivery of another shipment.

In June, 1971, Mastantuono was unexpectedly summoned to Paris by Bec.** Bec told Mastantuono that a Fiat was stranded in Montreal because the owner had no visa to drive it across the border. Bec then introduced Mastantuono to another Frenchman, Joe Signoli, who offered Mastantuono $60,000 to deliver the Fiat. When Mastantuono accepted the offer, Signoli took Mastantuono to a bar and pointed to a man Signoli identified as Paul Graziani. Mastantuono was told to contact Graziani in Montreal. (Tr. 2158-60).

Mastantuono returned to Montreal, met with Graziani, and was introduced to Felix Rosso, who was then driving the Fiat. Mastantuono first told them he would try to find an identical Fiat but, when that proved unsuccessful, Mastantuono asked his friend Jean Cardon if he would lend Mastantuono his services and his stationwagon for $10,000 to deliver a load of heroin. Cardon agreed. Mas-

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* The uneven split resulted from the fact that Mastantuono kept the Citroen as a gift for Danielle. (Tr. 2153).

** Between September, 1970 and June, 1971, Mastantuono delivered another automobile, a Ford Galaxy, which contained heroin. The Galaxy was delivered to a residence in New Jersey in February, 1971 for Louis Cirillo. In August, 1971, Mastantuono also delivered at the same New Jersey residence a Barracuda containing heroin for Cirillo. See *United States* v. *Cirillo, supra.*

tantuono, Graziani, and Rosso then took the Fiat to Cardon's garage, dismantled it, and removed 80 kilograms of heroin.

While dismantling the Fiat, Mastantuono asked who had concealed the heroin in the Fiat and was told that it was "the Uncle's" mechanic. The next day, Mastantuono, Graziani, Rosso, Jean Cardon, Jean Cardon's wife and Danielle replaced the heroin into Cardon's stationwagon—the men stashing it inside the door panels and the woman sewing it inside the seats. (Tr. 2160-66, 2177-78, 2704-09).

When the stationwagon was packed and ready, Rosso sent Danielle to Miami to deliver a letter to a man named Felix. Rosso gave Danielle a photograph of himself as a means of identification. Danielle flew to Miami, found the man named Felix, a Frenchman, and presented him with the letter and photograph. Felix immediately took her to a public telephone booth and had her telephone Rosso. After Felix spoke to Rosso, Danielle flew back to Montreal, and Rosso told Mastantuono to drive the stationwagon to New York City the next day. (Tr. 2178-79, 2709-12).

That night, Mastantuono instructed Cardon to drive the stationwagon ahead to New York City and wait at the Holiday Inn. On the following day, June 21, 1971, Mastantuono and Danielle drove to New York in Mastantuono's Corvette. About midnight, Rosso and Mastantuono picked up the stationwagon and Rosso directed Mastantuono to a house in New Jersey. At the house, Mastantuono saw Tony Stassi who waved them into the garage. Inside the garage, Mastantuono saw Sorenson, Charles Alaimo, Carmine Consalvo and Albert Pierro.*

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* Mastantuono identified photographs of Carmine Consalvo and Albert Pierro. (GX 66, 11). He also identified photographs of Pierro's house in Fort Lee, New Jersey, which was the same house where Pierro was arrested a few months later with wine bottles concealing pure heroin. (GX 86-87). See *United States* v. *Christophe, supra.*

Rosso and Mastantuono quickly removed the heroin from the stationwagon, placed it on the garage floor and returned to Manhattan. (Tr. 2180-83, 2713-15).

The following day, Rosso picked up Mastantuono and took him to 62nd Street, where Rosso went alone into an apartment house. About an hour and a half later, Rosso emerged from the apartment house with another man, each carrying two suitcases. Rosso introduced the man to Mastantuono as "the Uncle." * Rosso gave Mastantuono the suitcases and told him that the suitcases contained one million dollars, which they were to take back to Montreal. Mastantuono and Rosso placed the suitcases in his Corvette, picked up Danielle and Jean Cardon, and left for Montreal with the million dollars. En route, Cardon and Mastantuono removed the panels from the stationwagon doors and stopped along the way at each thruway diner to stuff the money from the suitcases into the doors. They filled the door panels with all but $350,000, which they concealed in the rear of Mastantuono's Corvette. Cardon then drove the stationwagon across the border to Montreal; Mastantuono, Rosso and Danielle followed in the Corvette. (Tr. 2183-89, 2715-16).

Back in Montreal, Mastantuono, Danielle, Rosso, Graziani, Cardon and Cardon's wife gathered at Cardon's apartment and counted the money. They were $100,000 over. Rosso and Graziani told Mastantuono that the two of them intended to keep the $100,000 and asked Mastantuono to smuggle it into France for them. Mastantuono agreed. Later, he recruited Andre Arioli, Arioli's wife and Danielle to carry it to France. (Tr. 2189-91, 2717-18).**

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* Mastantuono identified a photograph of Frenchman Jean Guidicelli as "the Uncle." (GX 95).

** Eventually, Joe Signoli forced Rosso and Graziani to give up the $100,000, taking them to Toulon to see "the Uncle" about it. (Tr. 2190-94).

On October 28, 1971, Mastantuono was arrested in Canada and in June, 1972 he was extradited to New York. (Tr. 2194-95, 2719-20).

The Defense Case

A. Joseph Stassi

Joseph Stassi testified in his own behalf. He admitted having been incarcerated at Atlanta as a result of his conviction in 1967 for importing 100 pounds of heroin. He further admitted that he had previously been convicted of perjury. On cross-examination however, he testified he was not guilty of either of the crimes for which he had been convicted. He testified that he had been framed in the narcotics case; and he testified that he had unintentionally perjured himself when he gave false answers under oath on the advice of his attorney.

Joe testified that it was at the Atlanta penitentiary that he first met Perna and Verzino. He denied any involvement with either Perna or Verzino in narcotics; he further denied that he had ever had a conversation with Perna at Atlanta, let alone conversations to murder Verzino, Verzino's girlfriend or Sorenson. (Tr. 3155-94, 3201-18).

Joe also related to the jury that in the summer of 1973 he went to visit Verzino in the library. When he went back in the stacks, Joe testified, he found Verzino performing a homosexual act with inmate Harold "Sandy" Robbins and walked away, telling Verzino to leave him alone. (Tr. 3129-53).

Joe called six Atlanta inmates who testified about the homosexual incident in the library between Verzino

and Robbins.* Two of the six witnesses, Harold "Sandy" Robbins and Joseph La Caze, testified that Verzino threatened "to get" Joe Stassi as a result of that incident.**

Joe Stassi called nine Atlanta inmates who testified that, while Perna and Verzino were incarcerated with them in Atlanta, they were approached by either Verzino or Perna, or both, and asked to assist them in importing heroin on the outside. The witnesses testified that Joe Stassi's name was never mentioned to them in any conversation by either Perna or Verzino.***

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* Those witnesses who testified about the homosexual incident were Thomas Callahan (Tr. 3049-53), Lester Borman (Tr. 3057-64), Allen Anderson (Tr. 3064-74), Joseph Leroy Newman (Tr. 3075-80), Harold "Sandy" Robbins (Tr. 3081-90) and Joseph La Caze. (Tr. 3102-07). Defense counsel spared the jury none of the offensive details. (Tr. 3083, 3278).

** The upshot of all this testimony was to supply a personal motive for Verzino to frame Joe Stassi, clearly necessary to refute the Government's proof which established that Verzino worshipped Joe Stassi. One of Verzino's letters to his girlfriend Susan, written on September 15, 1969, expressed the following sentiments about Joe Stassi: "[H]e is like an older brother to me and commands all my respect because he is a man in the truest sense of the word, I've met none better." (GX 21). Moreover, the Government proved at trial that Verzino had originally told the Government when he began cooperating in August, 1974 that Joe Stassi was not involved in the smuggling operation out of Atlanta and maintained that story until March, 1975, when he was informed of Joe Stassi's plan with Perna in 1972 to murder him and his girlfriend Susan. (Tr. 1583-84, 1848-53).

*** Those witnesses who testified to conversations with Perna and Verzino, about importing heroin were Joseph La Caze (Tr. 3218-30), Norman Rothman (Tr. 3237-42), Charles Parris (Tr. 3253-67), Artis Jackson (Tr. 3268-71), Emmett Bishop (Tr. 3272-85), Raymond Mangiapano (Tr. 3323-31), Frederick Ray

[Footnote continued on following page]

Joe Stassi called three inmates of the Federal House of Detention at West Street who testified that they were incarcerated there with Perna in the summer of 1974. They uniformly testified that Perna told them that the Government was pressuring him to frame Joe Stassi.*

Joe Stassi also called former Atlanta inmates Thomas Kapotas and Daniel Grillo to testify in his behalf. Kapotas denied ever having heard Joe Stassi, Verzino or Perna discussing narcotics in Atlanta; he denied ever having received money from Perna, Verzino or Joe Stassi; and he denied having talked with Joe Stassi about killing Verzino with strychnine. (Tr. 3376-93). Grillo likewise denied ever having heard Joe Stassi, Verzino and Perna discussing narcotics in Atlanta or Kapotas and Joe Stassi discussing murdering Verzino with strychnine.**

B. Tony Stassi

Tony Stassi did not testify in his own behalf but called three witnesses.

Carlo Bonniello testified that he owned a home at 19 Holly Place in Larchmont, New York, with a two-car garage located in the rear. Bonniello testified that he

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Williams (Tr. 3368-75), Gary Bowdach (Tr. 3360-63), and Jean Orsini (Tr. 3525-29). Their testimony also directly contradicted the testimony of Perna and Verzino on cross-examination denying narcotics conversations with these inmates.

* The three witnesses were John Raymond Malone (Tr. 3244-52), Nelson Garcia (Tr. 3334-39) and Albert Howard Barber (Tr. 3395-3412).

** Kapotas' and Grillo's testimony squarely contradicted the testimony of Perna, Verzino and Condello that Kapotas, and to a lesser extent Grillo, were apprised of the smuggling operation and the murder plans, and that Kapotas had received almost $10,000 from Perna and Verzino out of their profits. (Tr. 474-76, 782-86 1362, 1668-69).

never lent the use of his garage to anyone in September 1970. (Tr. 3228-45).

Joseph Mirabella testified that he owned the home at 23 Holly Place in Larchmont, New York, with a two-car garage located in the rear. Mirabella identified GX 82 as a photograph of his house. He testified that he had never lent his garage in September, 1970 for others to park a Citroen. Mirabella did testify that several years ago he had met Tony Stassi on two occasions through a former neighbor, Salvatore Autera. (Tr. 3445-57).

On cross-examination, Mirabella denied knowing Tony Stassi's girl friend Carol Hoover, but was unable to explain the presence of two toll calls in June, 1973 from his telephone to Carol Hoover's residence in Miami.* (GX 52, 53; Tr. 3465-69). Mirabella was likewise unable to explain the presence of two toll calls from his telephone to Tony Stassi's Hollywood, Florida residence in January, 1975. (Tr. 3475-77).** Also on cross-examination, Mirabella testified that in September, 1970, Mirabella left his home for work about 8:30; his three children left for school about the same time; and his wife was left home alone for the day.

Salvatore Autera followed Mirabella and testified that Tony Stassi, who he referred to as "Uncle Tony", was one

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* Mirabella suggested that Autera might have made the telephone calls from Mirabella's telephone if Autera had moved to Miami by then. However, Autera, who testified later, related that he had moved to Florida at the end of July, 1973. (Tr. 3491).

** Mirabella again suggested that Autera might have made both the January, 1975 telephone calls, using Mirabella's telephone. When further cross-examined about the fact that this suggestion contradicted his earlier testimony that Autera had visited him in May, 1974 and in March, 1975, but not in December, 1974 or January, 1975, Mirabella testified that Autera made many other trips to New York, which Mirabella thought he had already testified about earlier. (Tr. 3477).

of his pharmacy customers when Autera owned the Bell Pharmacy on West 72nd Street in Manhattan.* Autera testified that he frequently made telephone calls to Tony Stassi and Carol Hoover from Joseph Mirabella's telephone. (Tr. 3489-3507).**

C. William Sorenson.

Sorenson did not testify or offer any evidence in his behalf.

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* Of particular interest here is the fact that Joe Stassi told Verzino in October, 1970 that Tony Stassi had borrowed approximately $60-70,000 from a "druggist friend" to finance the first heroin shipment. (Tr. 1350).

** On cross-examination, Autera initially testified he had visited Mirabella's house in Larchmont in December, 1974 and February, 1975; he could not recall visiting in January, 1975, thus leaving Mirabella's explanation of the January 1975 toll calls to Tony Stassi in obvious doubt. (Tr. 3515-19). When later shown Mirabella's toll records reflecting the January, 1975 calls to Tony Stassi in Florida, Autera corrected his testimony stating that he might have visited Mirabella in January, 1975 and made the telephone calls to Tony Stassi. However, when asked if he recalled making both telephone calls, each a day apart, Autera retreated testifying he could not remember making the telephone calls. (Tr. 3522-24).

ARGUMENT

POINT I

The Prosecution Cannot Be Charged With Responsibility For Otvos' Parole And Deportation, And, In Any Event, His Unavailability At Trial Did Not Deprive Appellants Of A Crucial Defense Witness.

Joseph and Anthony Stassi bid this Court to set aside their convictions and enter judgments of acquittal based on their claim that Judge Knapp erred in finding that the grossly negligent conduct of the Board of Parole in paroling Otvos for deportation was not attributable to the prosecution and did not deprive them of a crucial defense witness. On the contrary, Judge Knapp's findings, fully supported by the record below, were error free.

A. The Hearing.

On April 17, 1975, Indictment 75 Cr. 395 was filed charging the Stassi brothers, Otvos, Sorenson and Guidicelli with the narcotics violations on which the Stassis and Sorenson were eventually tried. On the same date, the Government filed writs of habeas corpus *ad prosequendum* for Joe Stassi, Otvos and Sorenson to have them appear for arraignment. Sorenson appeared on April 21, 1975; and Joe Stassi appeared on April 24, 1975. Otvos never appeared. The Government informed the trial court that it had discovered that Otvos had been paroled and deported on March 3, 1975.

Upon learning that their co-defendant Otvos had been deported and would be unavailable for trial, the Stassis quickly seized the opportunity to move to dismiss the indictment, alleging that the Government had inten-

tionally paroled and deported Otvos to deprive them of exculpatory testimony. After hearing argument on the motion on September 19, 1975, Judge Knapp ordered a hearing, which was held on October 14, 1975.

At the hearing the Government called four witnesses: J. Wayne Allgood, Administrative Hearing Examiner for the Southeast Regional Office of the United States Board of Parole; and James Bradley, Carlo Boccia and Anthony Mangiaracina, Special Agents in the Newark, New Jersey office of the Drug Enforcement Administration.

1. The Hearing Testimony.

Allgood testified that Otvos was originally ineligible for parole as a prisoner sentenced under the Harrison Act.* His mandatory release date was June 23, 1976. (GX 1A).** However, as a result of a change in the law in 1974, making Harrison Act offenders eligible for parole, the Board of Parole scheduled parole hearings in December, 1974 and January, 1975 for Harrison Act prisoners, including Otvos. (Tr. 46-48).***

Preparatory to Otvos' parole hearing, on December 2, 1974, the Board requested the Intelligence Division of the Department of Justice to supply it with information concerning Otvos' possible involvement with organized crime. (GX 1B; Tr. 49-50). When the request went unanswered

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* Title 21, United States Code, Sections 173 *et seq.* (now repealed).

** A number of exhibits were offered at the hearing and sequentially marked in evidence. Reference to them should not be confused with similarly numbered trial exhibits.

*** The change in the law making Harrison Act prisoners eligible for parole resulted from a 1974 amendment. Pub. L. 93-481, 88 Stat. 1455 (1974). By that change, Otvos became eligible for parole after having served a third of his sentence, on September 28, 1971. (Tr. 51).

for more than a month, the Board held a parole hearing on January 21, 1975 and made a tentative decision either to refer the matter to the Board of Parole in Washington for its decision or to parole Otvos for deportation on March 3, 1975. (GX 1C; Tr. 51-52). One week later, on January 28, 1975, Allgood and Southeast Regional Director Thomas R. Hosclaw * reviewed the tentative decision and decided to parole Otvos for deportation on March 3. (GX 1E; Tr. 53-54). A notice of the parole decision was immediately sent out on January 30, 1975 to Otvos ** (Tr. 57-58).

The next day, a one-page memorandum addressed to Mr. Hosclaw was received from the Justice Department responding to the Board's December 2, 1974 request for Otvos' organized crime contacts. (Tr. 55-56). The pertinent paragraph stated:

> "We have received information that Mr. Otvos has been advised of the possibility of being indicted for narcotics violations committed by him and others while presently incarcerated at Atlanta Penitentiary." (GX 1D).

This memorandum was routed directly to Mr. Hosclaw and then filed. No one else in the office, including Allgood, recalled seeing the memorandum. (Tr. 69-71).***

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* Mr. Hosclaw died in September, 1975.

** Allgood testified that, in addition to informing Otvos, notice of the Board's parole decision was sent to the United States District Court in the Eastern District of New York, where Otvos had been sentenced, and the Atlanta Penitentiary, where Otvos was incarcerated. In accordance with its procedures, notice was not sent to other agencies of the Department of Justice, including the United States Attorney's Office in the Southern District of New York or the Drug Enforcement Administration. (Tr. 57-59, 66).

*** Allgood testified that, because the memorandum arrived after, rather than before, the parole decision had been made and notice sent to Otvos, it appeared to him that Mr. Hosclaw merely read and filed it. No action was taken. (Tr. 59, 69-71).

Special Agent Bradley testified that on November 7, 1974 he had opened an investigation of Otvos. (Tr. 113). Bradley testified that, during the first week of December, 1974, in conjunction with the Newark Organized Crime Strike Force, he had Otvos brought on a writ to Newark where he made an effort to solicit Otvos' cooperation.* Otvos denied any involvement in narcotics activities at the penitentiary. He also refused to cooperate, explaining that he was eligible for parole in May, 1975. (GX 2; Tr. 93-96).** After interviewing Otvos, Bradley spoke with an Intelligence Analyst in the Eastern District Strike Force who was investigating Otvos' organized crime connections for submission to the Parole Board. She confirmed to Bradley that Otvos' parole eligibility date was in May, 1975. (Tr. 109-10). Bradley did not contact the Parole Board or the Immigration and Naturalization Service and did not learn of Otvos' parole and deportation until late April, 1975. (Tr. 98-99, 112-14).

Special Agents Boccia and Mangiaracina testified that they had also interviewed Otvos in Newark in December, 1974 and that Otvos also had told them that he was not to be paroled until May, 1975. (Tr. 135-52, 155-63).

Joe Stassi testified that he had been brought from Atlanta to Newark in July and November of 1974 and

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* Joe Stassi was brought at the same time as Otvos from Atlanta to Newark by the Strike Force. Stassi had previously been brought to Newark, along with inmate Thomas Kapotas, in July, 1973. On each occasion, Stassi denied to the agents any involvement in narcotics and likewise refused to cooperate. (103-05).

** A letter written by Otvos on February 9, 1975 to the Immigration and Naturalization Service revealed that prior to that date, Otvos believed that he was not to be paroled until May, 1975 and was surprised by the notice of the Board's decision to parole him earlier, in March, 1975. (Tr. 153-55).

questioned by the agents about his involvement in narcotics, an involvement which he denied. (Tr. 179-81). Stassi testified that Otvos was brought to Newark at the same time in November, 1974 and Otvos later told him that he had been questioned by the agents about Joe and Tony and had told the agents there was no conspiracy involving them. (Tr. 182).

2. Judge Knapp's Findings.

At the conclusion of the hearing, Judge Knapp denied the Stassis' motions to dismiss, finding first that the United States Attorney's office and the Drug Enforcement Administration agents were not negligent in relying upon their information that Otvos was ineligible for parole before May, 1975. Secondly, Judge Knapp found that, although the Parole Board was grossly negligent in paroling Otvos for deportation after receiving notice of the possibility of his indictment, neither the United States Attorney's office nor the Drug Enforcement agents had any knowledge of the Parole Board's action and could not be charged with the Board's negligence. Thirdly, the Judge found that the claim that Otvos' testimony would have been of value to the defense was "unpersuasive." (Tr. 168-74, 194-95).

The Stassis challenge all three of Judge Knapp's findings.

B. Judge Knapp's Findings Were Correct.

1. The Prosecution Was Not Negligent.

First, the Stassis claim that, contrary to Judge Knapp's finding that the United States Attorney's Office and the Drug Enforcement Administration agents were not negligent, the prosecution "was obligated to take

some action to secure Otvos' presence for trial, since they knew full well that his parole was pending." (A. Stassi Br. at 47).

It is clear, however, that the Assistant United States Attorney in charge of the grand jury investigation from December, 1974 to March 13, 1975 had no knowledge whatsoever of Otvos' parole.* It is equally clear that, while the Drug Enforcement Administration agents had knowledge that Otvos might be paroled, their information was that the event would occur at the earliest in May, not March, 1975.**

Nor can it fairly be argued that the agents should not have relied on the information they had received concerning the May parole date. For not only had the agents received the information of the May parole date from Otvos, who was obviously in an excellent position to

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* Joe Stassi takes the Government to task in his brief by suggesting that the Government attempted to mislead Judge Knapp by the submission of the affidavit of Assistant United States Attorney Harry C. Batchelder, who was in charge of the grand jury investigation until March 13, 1975, wherein Mr. Batchelder averred that he had not targeted Otvos as a defendant. Stassi's suggestion, never made below, is frivolous.

To be sure, Agent Bradley may well have focused *his* attention on Otvos as of December, 1974. However, it will hardly come as a surprise to this court that Mr. Bradley did not immediately convey all of his developing thoughts about the investigation to an Assistant United States Attorney whose responsibilities were not limited to this single case.

** In that regard, it is of more than passing interest to note that the Stassis' arguments not only conveniently avoid the fact that the agent's information was that Otvos' parole eligibility date was May, 1975, but they fail to even suggest any reason why the agents' reliance upon that information was negilgent. With the facts as they were established below, their silence is understandable.

know,* but they had confirmed the May date with the Intelligence Analyst in the Eastern District of New York who was then investigating Otvos' organized crime contacts to report to the Parole Board.

That is not to say, as the Stassi's strenuously argue, that the Drug Enforcement Administration agents could not have taken additional steps, such as "lodging a warrant . . . or making one perfunctory telephone call to the Board to verify the exact date of Otvos' scheduled release from the Atlanta Penitentiary." (A. Stassi Br., at 44). Obviously, had the agents even suspected that Otvos might be paroled before May, they would have taken those steps, as Judge Knapp acknowledged below. (Tr. 170). But, as this Court had recent occasion to note in *United States* v. *Stofsky*, 527 F.2d 237 (2d Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3625 (U.S. Apr. 26, 1976) (No. 75-1554), where a similar argument was made and rejected that the Government was negligent in failing to conduct a deeper probe of a witness' financial affairs, which would have revealed the falsity of the witness' trial testimony:

> "We do not employ the omniscience of a Monday morning quarterback as the standard for determining what investigation should have been made by the government." *Id.* at 244.

As in *Stofsky*, moreover, it is perfectly clear that the agents' interest in Otvos cannot be characterized as one adverse to preserving his availability for trial. Quite the contrary is true. They were vitally interested in assuring that Otvos, a target of their investigation, was

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* Clearly Otvos believed in December, 1974, that his parole date was in May, 1975, since, as previously pointed out, he stated in his February 9, 1975 letter to the Immigration and Naturalization Service that, although he was originally due for parole in May, 1975, he had very recently received notice that the Parole Board had granted him parole, effective March 3. (Tr. 153)

not paroled and deported but was available for prosecution. Otvos' refusal to cooperate and his denial of conspiratorial involvement—the same sort of denials originally advanced by the Stassis—were hardly the sort of information that would have induced the agents to spirit Otvos away to France. As Judge Knapp aptly observed below:

> "I can't see any suggestion, anything before me that any Government employee or agent had the slightest desire to get rid of this man or any reason to get rid of him." (Tr. 167).

Absolutely no basis exists to support the Stassis' claim that Judge Knapp was in error when he found that neither the United States Attorney's office nor the agents were guilty of negligence.

2. The Parole Board's Negligence Cannot Be Attributed To The Prosecution.

The Stassis also challenge the second of Judge Knapp's findings—that the Parole Board's negligence cannot be attributed to the prosecution—claiming that the Justice Department's communication to the Parole Board that Otvos might be indicted "established a sufficient nexus between the Prosecution and the Parole Board to justify an imputation of negligence to the Prosecution." (A. Stassi Br. at 47). This claim is meritless.

The Stassis do not challenge the practical logic of this Court's decision in *United States* v. *Quinn*, 445 F.2d 940, 944 (2d Cir.), *cert. denied*, 404 U.S. 850 (1971), that the prosecution cannot be held to have constructive knowledge of independent actions of other federal agencies. Rather, they seek to sidestep *Quinn* by claiming that the Parole Board's action was akin to the actions of the Immigration and Naturalization Service which

were attributed to the prosecution in *United States* v. *Mendez-Rodriguez*, 450 F.2d 1 (9th Cir. 1971) and *United States* v. *Tsutagawa*, 500 F.2d 420 (9th Cir. 1974). Their reliance upon both cases is entirely misplaced.

In the first place, unlike the situation presented here, in *Mendez-Rodriguez* as well as in *Tsutagawa* the United States Attorney's office knew of the Immigration and Naturalization Service's deportation of selected illegal alien-witnesses. In *Tsutagawa* it was shown that the United States Attorney's office instructed the Border Patrol agents to return the illegal alien-witnesses to Mexico; and in *Mendez-Rodriguez* it was shown that the established policy of the Immigration and Naturalization Service, obviously known to the United States Attorney's office, was to detain selected illegal aliens as witnesses and to interview and return all others to Mexico.* Judge Knapp found below that the United States Attorney's office had no knowledge of the Parole Board's decision to parole Otvos for deportation, and Stassi points to nothing at all to indicate that this finding was erroneous.

Also, in *Tsutagawa* and *Mendez-Rodriguez*, the Immigration and Naturalization Service was acting in its capacity as an investigative arm of the United States Attorney's office in prosecuting violations of the Immigration laws. Although that particular kind of relationship —absent in the instant case—between the prosecution and a Drug Enforcement Administration agent was held by this Court in *United States* v. *Morell*, 524 F.2d 550 (2d Cir. 1975) to warrant attributing the agent's knowledge of a confidential informant file to the prosecutor, who

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* Tony Stassi's suggestion that the *Mendez-Rodriguez* opinion does not clearly reveal that the United States Attorney's office had knowledge of the policy of the Immigration and Naturalization Service naively overlooks the fact that it is the United States Attorney's Office that prosecutes Immigration law violations.

had no actual knowledge of the file,* significant here is Judge Moore's express limitation on *Morell's* holding:

> "While the prosecutor cannot be charged with the failure to produce information in the possession of *any government official*, in this case it seems fair to view McElroy as an arm of the prosecutor." 524 F.2d at 555 (emphasis added).

Chief Judge Friendly's observations in his concurring opinion in *United States* v. *Morell*, *supra*, are equally instructive on the issue presented here:

> "While Giglio v. United States, 405 U.S. 150, 154 (1972), should not be pressed to extremes, such as imputing to an Assistant United States Attorney in Brooklyn knowledge of papers in the files of another in San Francisco, see United States v. Sperling, 506 F.2d 1323, 1333 (2d Cir. 1974), cert. denied 420 U.S. 692 (1975), Agent McElroy, who had possession of the confidential file on Valdez, was an important part of the prosecution team." 524 F.2d at 557.

The "intimate relationship" that was shown to exist between the prosecutor and the drug agent in *Morell*, which justified attributing the agent's knowledge to the prosecutor, has no parallel in the present case. In fact, the prosecution here had no contact at all with the Parole Board; and, likewise, the Parole Board had no contact with the prosecution. Tony Stassi's allegation that the Justice Department's memorandum to the Parole Board supplied the "nexus" is absurd. That communication

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* In *Morell*, the agent was charged with the supervision of the informant-witness; the agent actively participated in the criminal investigation which preceded the trial; and he sat at the prosecution table throughout the trial. In short, he was "intimately involved in the prosecution." 524 F.2d at 555.

was between the Justice Department, not the United States Attorney's office, and the Parole Board. There was no reciprocal communication from the Parole Board advising the United States Attorney's office, or the Justice Department for that matter, of the Board's decision to parole Otvos for deportation. Plainly this one isolated, indirect communication cannot be construed to convert the Parole Board into an arm of the prosecution and, thereby, have charged to the prosecution in this case, or any case, the negligence of one of the Federal Government's "thousands of employees in the fifty states of the Union." *United States* v. *Quinn*, *supra*, 445 F.2d at 944.* In fact, this Court has consistently refused to attribute to the prosecution independent acts of employees outside its immediate control and unknown to it. See *United States ex rel. DiGiangieno* v. *Regan*, 528 F.2d 1262 (2d Cir. 1975); *United States* v. *Sperling*, 506 F.2d 1323, 1333 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); *United States* v. *Mosca*, 475 F.2d 1052, 1059 (2d Cir. 1972), *cert. denied*, 412 U.S. 948 (1973).

Furthermore, even indulging in the unsupported assumption that the Parole Board was intimately connected with the prosecution, it still would not follow under the circumstances established below that the prosecution was accountable for the Board's negligence. The Court remanded in *Morrell* to have the trial court conduct a hearing to determine whether, aside from his intimacy with the prosecution, the agent was aware of the particular defense request for the kind of matters which were contained in the undisclosed confidential informant file. Here, although the Parole Board had ample cause to ap-

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* Manifestly, the rationale underlying such decisions as *United States* v. *Morell*, *supra*, and *Giglio* v. *United States*, *supra*, is inappropriate here. It would not only be unreasonable, but it would be completely unrealistic to suggest that the Government establish procedures and regulations to assure that communications of the sort involved in this case be furnished to every potentially interested or affected Federal agency and employee.

preciate that Otvos' parole and deportation might well end the likelihood of any prosecution of him, it is highly unlikely that the Board could appreciate that Otvos' unavailability for prosecution might somehow prejudice others. In fact, Judge Knapp found nothing to indicate that the Parole Board entertained thoughts of protecting the interests of others in its request to the Justice Department concerning Otvos. (Tr. 194). That being so, the alleged prejudice to the Stassis caused by Otvos' deportation was not within the forseeable scope of the Board's action in paroling Otvos for deportation.*

3. Otvos Would Not Have Aided The Defense.

The Stassis' final challenge is to Judge Knapp's finding at the hearing, which he confirmed after trial in denying the Stassis' post-trial motions, that Otvos would not have been a valuable defense witness.** Naturally, the Stassis contend that they were irreparably prejudiced because Otvos' testimony "could have refuted" the testimony of Perna and Verzino that Otvos was the "French connection." (A. Stassi Br. at 52). This contention, which rests entirely upon speculation, is without merit.

In the first place, Otvos was a defendant, not an ordinary witness. As such, the Stassis would have had no reasonable expectation of being able to secure Otvos' testimony, since he had every right to assert his Fifth

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* In reaching his decision below denying the Stassis' motions, Judge Knapp simply assumed that the defendants could claim the benefits of the Board's negligence. (Tr. 194). In doing so, he did not have before him this Court's opinion in *Morell*.

** Denying Stassis' post-trial motions, Judge Knapp stated: "I am satisfied that if Mr. Otvos had been here, it would have gone worse with your client [Joe Stassi] rather than better . . . ." (Tr. 4077).

Amendment privilege.* See *United States* v. *Wyler*, 487 F.2d 170, 174 (2d Cir. 1973). Indeed, the likelihood that Otvos—a convicted French heroin dealer—would have taken the stand in a joint trial is particularly remote.

Nor can it be argued that the Stassis would have had an absolute right to a severance in order to assist them in obtaining Otvos' alleged testimony. The decision whether to grant or deny a severance is committed to the sound discretion of the trial court, see *Opper* v. *United States*, 348 U.S. 84, 95 (1954); *United States* v. *Projansky*, 465 F.2d 123, 138 (2d Cir.), *cert. denied*, 409 U.S. 1006 (1972); *United States* v. *Mazzochi*, 424 F.2d 49, 52 (2d Cir. 1970), and an exercise of this discretion will not be reversed except upon a clear showing that the denial was an abuse of discretion. See *United States* v. *Jenkins*, 496 F.2d 57, 67-68 (2d Cir. 1974), *cert. denied*, 420 U.S. 925 (1975). Employing the four criteria recently enunciated by this Court in *United States* v. *Finkelstein*, 526 F.2d 517, 523-24 (2d Cir. 1975), as appropriate in determining the necessity for granting a severance, it is beyond question that Judge Knapp properly could have refused a severance.

First, it is "unrealistic" for the Stassis simply to presume that Otvos would have waived his Fifth Amendment privilege and testified for them even at a trial in which he was not a defendant. Even affording the Stassis a large measure of speculation in this regard, necessitated by Otvos' deportation before the indictment, there is still absolutely nothing in the record to indicate that he would have been willing to waive his privilege and

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*This fact by itself—that Otvos was a defendant—provides still another basis for distinguishing the Ninth Circuit's holdings in *Mendez-Rodriguez* and *Tsutagawa* insofar as those decisions relieve defendants of showing that deported illegal alien-*witnesses* possessed exculpatory testimony.

subject himself to a searching cross-examination which might have been used against him in a later proceeding. Moreover, since Otvos denied his guilt and refused to cooperate with the agents in November, 1974, it is unlikely that he would have given up or lost his Fifth Amendment privilege by entering a plea of guilty so that Stassis could have compelled him to testify. S. *United States* v. *Finkelstein*, *supra*, 526 F.2d at 524; *Gorin* v. *United States*, 313 F.2d 641, 645-46 (1st Cir.), *cert. denied*, 374 U.S. 829 (1963). Indeed, a plea of guilty to the instant charges would have undermined substantially, to say the least, any use which Otvos would have been to the Stassis.

In addition, the Stassis' reliance upon the fact that Otvos denied his guilt to the agents in November, 1974, as conclusive proof that Otvos' testimony would have been exculpatory, is simply frivolous. Aside from the statistical reality that many guilty defendants maintain their innocence up to the time of their guilty pleas or convictions by jury verdict, Otvos, who was about to be paroled after spending eight years in prison on drug charges, had many motivations not to involve himself voluntarily in this matter. In short, Otvos' denial of guilt is clearly undeserving of the value which may be attached to a defendant's confession which exculpates someone else. See *Byrd* v. *Wainwright*, 428 F.2d 1017, 1021 (5th Cir. 1970). As Judge Knapp colorfully characterized the insignificance of Otvos' statements:

> "It was suggested by the agents that he [Otvos] was guilty of a conspiracy and he said no. That is hardly a man bites dog kind of news. A suspect denies implication." (Tr. 166).*

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* Indeed, Joe Stassi protested his innocence to the agents in July and December of 1974, to the trial court at his arraignment and throughout the trial below. Tony Stassi and Sorenson did likewise.

Finally, in evaluating the likelihood that Otvos might have been called as a witness by either Stassi, it is noteworthy that neither the Stassis, nor Sorenson, nor defendant Alaimo requested severances in order to call one another as witnesses. Why Otvos might have acted in an entirely different manner than they, or why they would have treated Otvos in a different manner, is nowhere explained in the Stassis' arguments.

Second, even assuming Otvos had been available and willing to testify below, and further assuming that his testimony would have exculpated the Stassis, his testimony simply would have been cumulative to Joe Stassi's own exculpatory testimony and the exculpatory testimony of his two principal defense witnesses, Thomas Kapotas and Daniel Grillo. Joe Stassi testified that, contrary to the testimony of Perna, Verzino and Condello, he never talked to Perna, Verzino, Condello, Kapotas or Grillo about smuggling heroin or murdering Verzino, Verzino's girlfriend and Sorenson. Kapotas and Grillo both corroborated Joe Stassi's testimony in each vital respect. Thus, Otvos would have been the fourth witness to attempt to refute the testimony of the Government's witnesses, not the "only witness" as the Stassis allege. (A. Stassi Br. at 52).

Third, a severance of Otvos' trial could properly have been refused as imposing an undue burden on judicial economy. The trial below lasted six weeks. A severance of Otvos' trial would have burdened the trial court with the kind of duplication of proof that this Court acknowledged in *United States* v. *Finkelstein*, *supra*, 526 F.2d at 524, was due "serious consideration." That Judge Knapp was intent on avoiding duplicitous trials of this case is evidenced by his denial of the

several severance motions made below by Joe and Tony Stassi and Alaimo.*

Fourth, Otvos' testimony would have been severely damaged by such impeaching evidence as his posture as a defendant with the concomitant "deep interest" a defendant has to testify falsely, and his previous conviction in 1967 for importing 5 kilograms of pure heroin from France into the United States.**

Accordingly, the Stassis would not be entitled to a reversal of their convictions had Judge Knapp deprived them of Otvos' testimony by refusing a severance. The same reasons that would support a finding that denying a severance would not have unfairly prejudiced the Stassis should apply here to support a finding that Otvos' unavailability did not unfairly prejudice the Stassis.

There are still further reasons for concluding that the Stassis were not deprived of due process. The Supreme Court's recent decision in *United States* v. *Agurs*, 44 U.S.L.W. 5013 (June 24, 1976), makes clear that the Government's suppression of "exculpatory" evidence results in a deprivation of due process only when the "omitted evidence creates a reasonable doubt that did not otherwise exist. . . ." 44 U.S.L.W. at 5017. Here, Judge Knapp's denial of the Stassis' post-trial motions to set aside their convictions, which encompassed a finding that

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* Severance motions were made by the Stassis and Alaimo throughout the pre-trial and trial proceedings. Significantly, Judge Knapp denied Alaimo's severance motion despite his recognition that a separate trial of Alaimo would require the Government only to prove the French end of the case, which consumed less than one-third of the trial time expended below.

** It cannot seriously be disputed that Otvos' testimony would have been subjected to far more impeachment than was the testimony of Kapotas and Grillo, who were not named as defendants, and, as a result, would have been less valuable.

Otvos' unavailability did not deprive them of a fair trial, surely carried with it an implicit finding that Judge Knapp remained convinced of appellants' guilt despite whatever "suppression" might have been occasioned by the actions of the Government.*

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* In fact, we submit there is no reason to believe that Otvos' testimony would have had the slightest effect upon the jury. In the final analysis, the strength of the Government's proof was founded upon the Government's ability to show the jury through prior consistent statements that its principal accomplice witnesses had told the Government independently of each oher about the smuggling operation and appellants' involvement, long before they had any opportunity to jointly fabricate a consistent story. Otvos' testimony could not have supplied the Stassis with evidence to impeach that strength.

Recognizing their helplessness to make a solid case for the proposition that Otvos' testimony would have refuted the Government's proof, Tony Stassi contends that the Court should not limit itself to assessing Otvos' value as a defense witness but should assess his value as someone with information which could have benefited appellants in preparing a defense. (A. Stassi Br., pp. 51-52). It is clear at the outset, however, that this is not the kind of case where the alleged governmental misconduct warrants consideration of Otvos' unavailability except as it is claimed to have affected the verdict. *Compare Grant* v. *Allredge*, 498 F.2d 376, 381 n. 5 (2d Cir. 1974) with *United States* v. *Kahn*, 472 F.2d 272, 287 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973). In any event, Stassi does not even attempt to articulate what possible kinds of information Otvos might have had which, through pre-trial preparation, would have provided the requisite evidence to satisfy the test laid down in these cases, despite the fact that Joe Stassi admitted talking with Otvos in December, 1974 with full knowledge that both were being interrogated by the Drug Enforcement Administration agents in Newark about a narcotics conspiracy in Atlanta involving them. (Tr. 181-89). Furthermore, Otvos' confinement at the Atlanta penitentiary from 1967 until March, 1973, affords little room to even speculate that he was in any better position than Joe Stassi to find witnesses or other evidence in the penitentiary to try to refute the testimony of Perna, Verzino and Condello.

POINT II

Tony Stassi Was Not Deprived Of His Fifth And Sixth Amendment Rights To Due Process And A Speedy Trial As A Result Of Otvos' Deportation Between The Filing And Sealing Of Indictment 73 Cr. 405 And His Trial On Indictment 75 Cr. 502.

Repeating the alleged prejudice to him caused by Otvos' unavailability for prosecution by the Government, Tony Stassi asserts that Otvos' deportation deprived him of his Fifth and Sixth Amendment rights to due process and a speedy trial because it occurred during an unnecessary delay between the dates of the filing of his original sealed indictment, 73 Cr. 405, on April 30, 1973 and his trial on the superseding indictment, 75 Cr. 502, on October 14, 1975. Stassi's assertion of prejudice—like his previous Otvos-related claim—is insubstantial, and his assertion of an unnecessary delay is frivolous.

Before reaching the lack of merit in Stassi's assertions, it should be recognized that the circumstances present here make Stassi's citation to *Barker* v. *Wingo*, 407 U.S. 514 (1972), setting forth standards with which to evaluate post-indictment delay, as controlling authority inappropriate.* The particular circumstances of the investigation of Stassi here, and, more importantly, the particular nature of the alleged prejudice, namely, Otvos' deportation, make *United States* v. *Marion*, 404 U.S. 307 (1971), which concerns pre-indictment delay, the appro-

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* In assessing post-indictment delay, the Supreme Court has recognized that four factors must be balanced on an *ad hoc* basis: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." 407 U.S. at 530.

priate authority.* That is so, because Otvos was not even arguably a potential defense witness upon a prosecution of Stassi on the earlier indictment, 73 Cr. 405.

Indictment 73 Cr. 405 charged Stassi alone with receiving the 40 kilograms of heroin Mastantuono imported from France in the Citroen and delivered to him on September 28, 1970. That indictment was based solely upon Mastantuono's testimony, and Otvos' connection with that transaction was unknown. Thus, an early trial of Stassi on that indictment would have raised no issue as to which Otvos' testimony would have been relevant. Indeed, Stassi makes no claim that Otvos' testimony was relevant for any purpose other than to refute Perna's and Verzino's testimony, which supported the prosecution on the superseding indictment, not the original sealed indictment.**

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* Pre-indictment delay does not implicate the Sixth Amendment's guarantee of a speedy trial, since it is only a formal charge that will "seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his association, subject him to public obloquy, and create anxiety in his family and his friends." 404 U.S. at 320. However, the Supreme Court has recognized that the Due Process Clause would require dismissal of an indictment if it could be shown that pre-indictment delay "caused substantial prejudice to [defendant's] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." 404 U.S. at 324.

** Although Stassi also alleges he was prejudiced by the surveillance of him by narcotics agents after the filing and sealing of Indictment 73 Cr. 405, that allegation of prejudice is specious. Putting to one side the exaggerated "Orwellian" description of what is nothing more than routine surveillance (A. Stassi Br. at 57), the existence of the indictment, whether sealed or unsealed, did not prevent the Government from continuing with the same or a separate investigation of Stassi's criminal

[Footnote continued on following page]

In addition to reflecting the realities presented by the particular facts and circumstances here and Stassi's particular allegation of prejudice, treating Stassi's claim as raising an issue of pre-indictment delay under *Marion* is wholly consistent with the logic of *United States* v. *Alo*, 439 F.2d 751 (2d Cir.), *cert. denied*, 404 U.S. 850 (1971). There, this Court refused to treat a two-year interval between the filing of a sealed indictment and the filing of a superseding indictment as a period of pre-indictment delay. The vital distinction is that, in *Alo*, the original and superseding indictments were identical. In fact, Judge Kaufman expressly stated in his opinion:

> "[A] superseding indictment, filed for no apparent reason other than to update the earlier one, could not cure an otherwise intolerable delay between the original indictment and trial. The constitutional right to a prompt trial cannot be circumvented by such a simple expedient as reshuffling substantially identical documents." 439 F.2d at 755.

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activities and, if relevant, as here, using the evidentiary fruits of that further investigation at the trial. *United States* v. *Hoffa*, 385 U.S. 293 (1966); *Massiah* v. *United States*, 377 U.S. 201, 207 (1963); *Grieco* v. *Meachum*, 533 F.2d 713, 718 (1st Cir. 1976); *United States* v. *Poeta*, 455 F.2d 117, 122 (2d Cir.), *cert. denied*, 406 U.S. 948 (1972); *United States* v. *Edwards*, 366 F.2d 853, 873 (2d Cir. 1966), *cert. denied sub nom. Parness* v. *United States*, 386 U.S. 919 (1967).

Stassi's further argument that the District Judges violated Rule 6(e) in granting the Government's applications to have the indictment remain sealed for the avowed purpose of conducting a separate investigation is not only frivolous but irrelevant, since he nowhere asserts any prejudice he sustained from the mere fact that the indictment was sealed. If anything, the sealing of the indictment saved him from the kinds of prejudice which the Supreme Court recognized often flow from a public accusation, *e.g.*, pre-trial incarceration, anxiety, embarrassment, financial difficulties, *etc.* See *United States* v. *Marion*, *supra*, 404 U.S. at 320.

Unlike the superseding indictment filed in *Alo*, the superseding indictment filed below can scarcely be characterized as "substantially identical" to the original sealed indictment. To repeat Judge Knapp's apt description of Stassi's posture after the superseding indictment was filed:

> "I think your client is in the position of having been indicted in this [superseding] indictment as though nothing had gone before. . . ." (Tr. of Hearing, April 24, 1975, at 5).*

Furthermore, as will be demonstrated in detail hereafter, the superseding indictment was not filed to update the original sealed indictment, as in *Alo*, but to incorporate the Citroen transaction into the superseding indictment as part of the overall proof of Stassi's far-flung heroin operation, which originated months before the Citroen delivery and continued for at least three years after that delivery.

Applying the pre-indictment *Marion* analysis,** it is evident that Stassi was not denied due process by the delay preceding the filing of the superseding indictment on April 17, 1975. There was no deliberate delay in the pre-indictment investigation to gain a pretrial advantage,

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* Judge Knapp reiterated this description in his decision denying Tony Stassi's motion to dismiss insofar as it was based on pre-indictment delay. (Memorandum Decision, footnote 6, June 20, 1975). (A. Stassi Appendix, p. A-39).

** In fact it seems insignificant here whether *Marion* or *Barker* v. *Wingo* is considered controlling authority, since the only factors applicable in this situation are common to evaluating a claim of unnecessary delay under both decisions: the length of delay; the reason for the delay; and the incidence of actual prejudice.

and there was no substantial prejudice to Stassi as a result of Otvos' unavailability.*

A. There Was No Deliberate Or Undue Delay In Procuring The Superseding Indictment In This Case.

The briefest review of the evidence adduced at trial and the affidavits submitted below in opposition to Stassi's motion reveals that the Government's extensive pre-indictment investigation was not delayed; indeed, it had not been completed prior to the filing date of the superseding indictment on April 17, 1975.

The Stassi investigation commenced with Mastantuono's extradition to the United States in June, 1972. At that time, he agreed to cooperate and detailed his part in delivering four heroin-packed automobiles to New York

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* The *Marion* court stated that in order to prevail on the issue of pre-indictment delay a defendant must show intentional delay *and* actual prejudice: "[pre-indictment delay violates due process only if it is shown that the delay] caused substantial prejudice to the [defendant's] rights to a fair trial *and* that the delay was an intentional device to gain a tactical advantage over the accused." 404 U.S. at 324 (emphasis added). While this Court has on occasion indicated that at least a demonstration of prejudice is necessary to sustain this defense, see *United States* v. *Mallah*, 503 F.2d 971, 989 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975); *United States* v. *Iannelli*, 461 F.2d 483, 485 (2d Cir.), *cert. denied*, 409 U.S. 980 (1972), the Court has recently stated that it has not resolved the issue of whether the *Marion* requirements are in the disjunctive or in the conjunctive. *United States* v. *Finkelstein*, *supra*, 526 F.2d at 525-26. While the Government maintains that both logic and the language of the *Marion* opinion clearly require a reading of the operative language in the conjunctive, the Court need not resolve that issue in this case since Tony Stassi has shown neither deliberate delay nor actual prejudice. See *United States* v. *Ianelli*, *supra*, 461 F.2d at 485 n.2; *United States* v. *Stein*, 456 F.2d 844, 848 (2d Cir.), *cert. denied*, 408 U.S. 922 (1972).

City, the first of which—the Citroen—he told the agents he delivered to a man the agents learned was Tony stassi.* During the next few months Mastantuono was driven into various suburbs in New York and New Jersey in search of the residential house he had described as the drop site. Finally, in March, 1973, Mastantuono was taken to Stassi's associate Salvatore Autura's neighborhood in Larchmont, New York. There, Mastantuono identified two similar houses at 19 and 23 Holly Place, across the street from Autura's residence. On April 6, 1973, Mastantuono testified before a grand jury and, on April 30, 1973, Indictment 73 Cr. 405 was filed and sealed.

Indictment 73 Cr. 405 was originally sealed because of the commencement in May, 1973 of what then appeared to be an independent investigation involving Stassi's efforts to smuggle at least 100 kilograms of heroin into Florida.** That investigation had at that time successfully penetrated Stassi's smuggling ring by utilizing, among other things, an informant.***

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* Mastantuono did not know Stassi by name. He selected Stassi's photograph out of several hundred photographs shown to him in the course of his debriefing.

** Of course, based upon later evidence which the Government adduced at the trial that Stassi had endeavored in 1973 to smuggle heroin from France into Canada for Perna and Malizia, it is now clear that the Florida investigation was merely directed at one branch of Stassi's criminal enterprise.

*** Although the Florida informant was not called by any party, his name was disclosed to the defense, who interviewed him, and written and tape-recorded conversations between Tony Stassi and the informant were turned over to defense counsel under Rule 16. Pertinent here is the fact that, in two conversations between them on December 12 and 13, 1972, in Miami Beach, Stassi told the informant that he was in need of help because two heroin shipments of 47 and 70 kilograms had been seized and six of Stassi's associates had been arrested. In a third conversation on August 8, 1973, Stassi told the informant to prepare to take a trip overseas, because he was going to make a deal for heroin and would require the informant's familiarity with ocean navigation.

In October, 1973, Condello surrendered to the Drug Enforcement Administration in Newark, New Jersey and agreed to cooperate. At that time, he informed the Government agents that, while he had been in prison at Atlanta, Joe Stassi, Perna and Verzino had made a heroin connection with a Frenchman in Atlanta and had succeeded in smuggling at least 100 or 150 kilograms of heroin from France, using Tony Stassi and Sorenson on the outside. Condello also agreed to work as a street informant and met several times with Perna and with Sorenson, who unsuspectingly confirmed Condello's information.

In December, 1973, Malizia was arrested; and, in February, 1974, Perna and Verzino were arrested. Thereafter, in August, 1974, Verzino agreed to cooperate. Verzino admitted that he had made a connection with Otvos in Atlanta to smuggle heroin into the United States and that 260 kilograms of heroin had been brought in. He falsely denied, however, that the Stassis were involved.

In September, 1974, Perna and Malizia escaped from the Federal House of Detention. One month later, Perna was recaptured and he agreed to cooperate. Like Verzino, he admitted that, while incarcerated at Atlanta, he and Verzino had made a connection with Otvos through which 260 kilograms of heroin had been smuggled from France. Like Condello, but unlike Verzino, Perna informed the Government agents that Joe Stassi had all the arrangements in France made through Tony Stassi and that Tony Stassi and Sorenson had received the heroin in New York.

Meanwhile, in November, 1974, Mastantuono was brought from a Florida prison to New York. At that time, Mastantuono confessed to the Government agents

that he had originally lied about the recipient of the heroin delivered in the stationwagon in June, 1971. He told the agents that the true recipient of that heroin was Stassi. He also identified a photograph of Albert Pierro as a person who was present when the stationwagon was delivered, and identified Pierro's house in New Jersey as the drop site.* Thereafter, in February and March, 1975, Mastantuono identified photographs of Sorenson, Consalvo and Alaimo as the individuals driving the Cadillacs when he delivered the Citroen in September, 1970 and as the persons inside Pierro's garage when he delivered the stationwagon in June, 1971.

Finally, in March, 1975, Verzino was informed by the prosecutor that Joe Stassi had planned to have him and his girlfriend Susan murdered in 1972. Minutes later, Verzino admitted that he had previously lied about Joe and Tony Stassi's involvement. He then related the facts, as he knew them, in full.

Based upon this history, the Government cannot be accused of engaging in the slightest delay in pursuing its complicated, continuing investigation of Stassi's international smuggling enterprise. Plainly, the investigation proceeded as expeditiously as circumstances would and did permit. See *United States* v. *Rubinson*, Dkt. No. 75-1197, slip op. 3119, 3137-38 (2d Cir., April 8, 1976); *United States* v. *Finkelstein*, *supra*, 526 F.2d at 526; *United States* v. *Ferrara*, 458 F.2d 868, 875 (2d Cir.), *cert. denied*, 408 U.S. 931 (1972); *United States* v. *De-*

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* Danielle Ouimet confirmed that Mastantuono had coached her to lie about the stationwagon delivery in order to prevent discovery of her conduct in sewing the heroin bags inside the seats. In November, 1974, before Mastantuono came to New York, she confirmed that he told her he was going to tell the Government the truth about the stationwagon delivery.

Masi, 445 F.2d 251, 255 (2d Cir.), *cert. denied*, 404 U.S. 882 (1971). Nor can the Government be faulted for delaying the unsealing of Indictment 73 Cr. 405 when it discovered evidence that the Citroen delivery to Stassi was not an isolated transaction but was part of a much larger, ongoing smuggling operation headed by Stassi. See *United States* v. *Iannelli*, *supra*, 461 F.2d at 485. This Court in *United States* v. *Briggs*, 457 F.2d 908 (2d Cir.), *cert. denied*, 409 U.S. 986 (1972), expressly recognized the propriety of the Government's continuing an investigation so as "to catch other fish in its net . . .". *Id.* at 911. See also *Massiah* v. *United States*, *supra*, 377 U.S. at 207; *United States* v. *Poeta*, *supra*, 455 F.2d at 122; *United States* v. *Edwards*, *supra*, 366 F.2d at 873. Here, moreover, the Government's good faith reliance upon its continuing investigation of Stassi as a basis for delaying the unsealing of the 1973 indictment is manifested by its several applications to the District Court to delay the unsealing of Indictment 73 Cr. 405 to expressly avoid jeopardizing its pending investigation of Stassi.* In short, the Government cannot be charged with an unnecessary or unjustified delay where its proven purpose was strictly to acquire further evidence of Stassi's complex and continuing criminal activities.**

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* Stassi's suggestion in his brief that the Government in its applications to the District Court attempted to justify the continued sealing by stating that Stassi was outside the United States is simply untrue. (A. Stassi Br. at 53-54).

** Needless to say, Stassi cannot successfully assert that he had a right to be arrested on Indictment 73 Cr. 405. *Cf. Hoffa* v. *United States*, 385 U.S. 293, 309-10 (1966). Likewise, he cannot successfully claim that the Government should have filed its superseding indictment at some earlier stage of its investigation. The Government is entitled, if not obligated, to continue its pre-indictment investigation to the point where there is "a

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B. Stassi's Claim Of Prejudice Is Insubstantial.

Stassi's claim that he sustained actual prejudice by the unavailability of Otvos at trial is, as previously argued at length, insubstantial and speculative.* Moreover, notwithstanding its occurrence before the filing of the superseding indictment, Otvos' deportation was not the consequence of an unnecessary delay in the filing of that indictment, let alone the consequence of a deliberate delay to permit that event to occur.

Simply stated, Stassi has not carried his burden of showing that the Government deliberately delayed to cause him prejudice, and, in any event, he was not substantially prejudiced as a result of Otvos' deportation. Thus, he is not entitled to have his well-deserved conviction vacated and the indictment dismissed.

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sufficient likelihood of gaining a conviction". *United States* v. *Capaldo*, 402 F.2d 821, 823 (2d Cir. 1968), *cert. denied*, 394 U.S. 989 (1969). When all is said and done, however, the delay in the prosecution of Stassi in this case on any indictment was attributable to the multiplicity of his criminal acts and the necessity for the Government's persistent efforts to investigate them. See *United States* v. *Mallah*, *supra*, 503 F.2d at 989.

* Realistically, what "harmed" Stassi was that the Government's continued investigation was successful in acquiring other incriminating evidence against him. That kind of harm, as one would suspect, is not legally cognizable prejudice. See *United States* v. *Nathan*, 476 F.2d 456, 461 n.13 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973).

POINT III

The Trial Court Did Not Abuse Its Discretion In Permitting The Government To Adduce Evidence Of Appellants' Conspiratorial Acts In 1973, Their Co-conspirators' Criminal Activities In 1973. And Their Association Together And With Others During And After 1973.

Shunning the more common objection that the Government's proof at trial was insufficient to support their convictions, appellants here complain that the Government adduced a veritable "deluge" of evidence of appellants' and their co-conspirators' criminal activities and that Judge Knapp abused his discretion in refusing to exclude much of that evidence as irrelevant and prejudicial. Their complaints reflect nothing more than a misconception of the law and a confused understanding and incomplete reconstruction of the record below.

A. Appellants' Conspiratorial Activities in 1973.

First, Sorenson contends that Judge Knapp erred under *United States* v. *Dennis*, 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951), in permitting the Government to introduce into evidence appellants' conspiratorial acts and declarations during 1973, which essentially dealt with Tony Stassi's and Sorenson's efforts to smuggle heroin from France into Canada, to be picked up there by Perna and Malizia and smuggled on to New York. The contention is completely without merit.

Sorenson does not appear to argue, nor could he fairly do so, that the Government and Judge Knapp misinterpreted *United States* v. *Dennis*, *supra*. Such an argument would require a gross misreading of Judge Hand's opinion * and the volume of decisions since *Dennis* allow-

* In *Dennis* the defendants were charged as members of a conspiracy alleged in the indictment to have existed between 1945 and 1948. The trial court permitted the Government to adduce

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ing proof of conspiratorial acts and declarations which happen to fall outside the precise time period charged in a conspiracy count. See, *e.g.*, *United States* v. *Araujo*, Dkt. No. 76-1085, slip op. 5101, 5103 (2d Cir. July 26, 1976); *United States* v. *Flores*, Dkt. No. 76-1195, slip op. 1219 (2d Cir. July 9, 1976); *United States* v. *Torres*, 519 F.2d 723, 727 (2d Cir.), *cert. denied*, 423 U.S. 1019 (1975); *United States* v. *Papadakis*, 510 F.2d 287, 294-95 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States* v. *Cioffi*, 493 F.2d 1111, 1115 (2d Cir.), *cert. denied*, 419 U.S. 917 (1974); *United States* v. *Super*, 492 F.2d 319, 323 (2d Cir.), *cert. denied sub nom. Burns* v. *United States*, 419 U.S. 876 (1974); *United States* v. *Nathan*, *supra*, 476 F.2d at 460; *United States* v. *Blassingame*, 427 F.2d 329, 331 (2d Cir. 1970), *cert. denied*, 402 U.S. 945 (1971); *United States* v. *Deaton*, 381 F.2d 114, 118 (2d Cir. 1967).* Rather, Sorenson argues that Judge Knapp misapplied the *Dennis* principle in permitting proof of the 1973 conspiratorial declarations and activities, because, he asserts, they were "not relevant to the existence of the original criminal understanding" since the conspiracy "had splintered and dissipated by December 31, 1972, and [the] evidence about [the] narcotics transactions

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evidence of defendants' declarations for a number of years preceding the 1945 date, and this Court affirmed, Judge Hand observing:

> "There can be no logical reason for limiting evidence to prove that the defendants were in a conspiracy between 1945 and 1948 to the period of the charge; if they were in the conspiracy earlier, declarations of any one of them or of any other person acting in concert with them are as competent as those made within the period laid." 183 F.2d at 231.

* Sorenson does make some suggestion that the Government's interpretation of *Dennis* in a memorandum submitted to Judge Knapp, an excerpt of which is quoted in Sorenson's Brief, misstates the prevailing law in this Circuit. (Sorenson Br. at 26). However, we submit that a fair reading of the decisions cited herein reveals the correctness of the Government's statement.

and conversations occurring in 1973 revealed the existence, taken at its best, of other crimes and other conspiracies. . . ." (Sorenson Br. at 27). This argument is completely without merit.

In denying Sorenson's post-trial motion asserting this alleged error, Judge Knapp found that the evidence at trial established that the conspiracy terminated at the earliest when appellants were arrested. (Tr. 4049).* That finding is unassailable, since the conspiracy never materially changed between 1970 and the end of 1973.

Joe Stassi continued as the ring's reigning elder in 1973, as he had been throughout 1970, 1971 and 1972;** and Tony likewise remained in complete control of the smuggling operation on the outside in 1973.*** Soren-

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* Noting the peculiar framework of this conspiracy, in particular its origination in the Atlanta prison, Judge Knapp expressed grave reservations whether even the appellants' arrest would terminate the conspiracy. (Tr. 4049). *Cf. United States* v. *DeSapio*, 435 F.2d 272, 283-84 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971).

** Evidence of Joe Stassi's continued control in 1973 permeates the record below. For example, in the Spring of 1973, Joe asked Verzino's opinion about Tony's negotiations with the Frenchmen to smuggle the heroin only between France and Canada, and not into New York. In the Summer of 1973, Joe told Verzino, upon Verzino's release in August, to wait for Tony to contact him about further heroin shipments. In September-October, 1973, Sorenson told Condello that Tony was down in Atlanta discussing with Joe the then expected heroin shipment. And, in late 1973 and January, 1974, Perna, who was not yet arrested, stated to Condello and Agent Bradley that Joe had called off the expected heroin shipment because Tony had wasted the purchase money.

*** In addition to Perna and Condello's testimony about the several meetings in 1973 with Tony and Sorenson in which Tony agreed to provide heroin to Perna and Malizia which he was then negotiating in France to purchase, Tony's negotiations with the Frenchmen in 1973 were amply corroborated by information contained in his 1974 passport application that he had traveled to Europe 10 to 12 times in the previous year. (GX 103).

son, moreover, retained his right-hand-man role as Tony's distributor in 1973, despite the 1972 proposal to "eliminate" him in favor of Perna. Thus, it is factually absurd for Sorenson to argue that his and Tony Stassi's activities in 1973 were not part of the original conspiracy. They were an integral part of the overall conspiracy proven at trial "of which the conspiracy charged in the instant indictment was a part." *United States* v. *Araujo*, *supra*, slip op. at 5103. *Accord*, *United States* v. *Papadakis*, *supra*, 510 F.2d at 294-95; *United States* v. *Cohen*, 489 F.2d 945, 949-50 (2d Cir. 1973).

Furthermore, appellants' proven status as the "core group" of the conspiracy makes it even more than absurd to contend that appellants' illegal activities in 1973 were not admissible as a part of the proof of the conspiracy. As a matter of elementary logic, appellants' activities necessarily formed and fashioned the conspiracy and were unmistakably within the scope of the conspiracy as they understood it. *United States* v. *Bynum*, 485 F.2d 490, 498 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974). See also *United States* v. *Cirillo*, *supra*, 468 F.2d at 1239.

In any event, even if the 1973 activities constituted a separate, independent conspiracy to import heroin from France, as Sorenson abstractly alleges, his further argument that the 1973 activities were not admissible as a subsequent similar conspiracy to import heroin from France by the same conspirators is specious.

Legally, Sorenson's efforts to distinguish the plethora of cases supporting admissibility of the 1973 evidence in unavailing. In fact, *United States* v. *Nathan*, *supra*, is unavailing. In fact, *United States* v. *Nathan*, *supra*, of twenty-one defendants charged with a conspiracy to import and sell heroin and cocaine. As part of its trial

proof, the Government had introduced evidence of several narcotics transactions participated in by defendants after the conspiracy period charged in the indictment. Sustaining the trial court's ruling which admitted that evidence, Judge Feinberg observed:

> "[E]vidence of a conspirator's post-conspiracy activity is admissible if probative of the existence of a conspiracy or the participation of the alleged conspirator." *Id.* at 460.

See *United States* v. *Super*, *supra*, 492 F.2d at 323. See also, *United States* v. *Torres*, *supra*, 519 F.2d at 727; *United States* v. *Cioffii*, *supra*, 493 F.2d at 1115.

Sorenson's proffered distinction between the admissibility of the "declarations" here and the admissibility of the "acts" in *Nathan* is not supported by the facts recounted in Judge Feinberg's opinion which refer to other "drug transactions". 476 F.2d at 460. See also *United States* v. *Miranda*, 526 F.2d 1319, 1331 (2d Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3692 (Apr. 30, 1976) (No. 75-1590).* In any event, the 1973 declarations of appellants and their co-conspirators, even if considered a part of a separate uncharged conspiracy,** were ad-

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* To expect a "drug transaction" to be proved without evidence of statements of the participants is, of course, ludicrous.

** Although Sorenson makes much of the fact that the indictment failed to charge the 1973 activities in Count One, that omission clearly does not preclude the Government from introducing such evidence. It is the proven existence of the conspiracy which is determinative of the issue of admissibility and it is wholly immaterial whether there are conspiracy allegations in the indictment. See *United States* v. *Richardson*, 477 F.2d 1280 (2d Cir.), *cert. denied*, 414 U.S. 843 (1973); *United States* v. *Marchisio*, 344 F.2d 653, 666-67 (2d Cir. 1965); *United States* v. *Olweiss*, 138 F.2d 798, 800 (2d Cir. 1943), *cert. denied*, 321 U.S. 744 (1944). See also *United States* v. *Zane*, 495 F.2d 683 (2d Cir.), *cert. denied*, 419 U.S. 895 (1974); Fed. R. Evid. 801(d)(2)(A)-(E).

Here, moreover, the Government filed a supplemental Bill of Particulars on September 12, 1975, one month before trial, setting

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missible against appellants below since, as previously shown, there was more than sufficient independent evidence that appellants and their co-conspirators were all members of the purportedly separate conspiracy in 1973 to import heroin. The co-conspirator exception to the hearsay rule focuses, after all, not on the crime of conspiracy as charged in the indictment, but on the relationship between the defendant and the extra-judicial declarant. See Fed. R. Evid. 801(d)(2)(A)-(E); S. Rep. No. 93-1277, 93d Cong., 2d Sess. 26 (1974); *United States* v. *Wiley*, 519 F.2d 1348, 1350-51 (2d Cir. 1975); *United States* v. *Geaney*, 417 F.2d 1116 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970); *United States* v. *Marchisio*, *supra*, 344 F.2d at 666-67; *United States* v. *Olweiss*, *supra*, 138 F.2d at 800.

B. Co-conspirators' Criminal Activities in 1973.

Unlike Sorenson, Tony Stassi does not limit his objections to the Government's proof of the 1973 conspiratorial activities, but claims more broadly that virtually every item of evidence elicited about events after 1972 was erroneously admitted by Judge Knapp. The claim not only lacks merit, but it reflects an incredible lack of understanding of the proper purposes for which such evidence was offered and received.

First, Stassi asserts a frivolous objection to a variety of criminal activities properly elicited on direct examina-

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forth an outline of the Government's expected proof with respect to the 1973 conspiratorial activities, thus obviating Sorenson's claimed lack of notice of this proof, see *United States* v. *Baum*, 482 F.2d 1325 (2d Cir. 1973), and variance between the trial proof and the particulars furnished before trial. See *United States* v. *Nathan*, *supra*, 476 F.2d at 460 n.11.

Furthermore, even if the 1973 evidence revealed nothing more than, as Sorenson alleges, a belated endeavor by appellants to negotiate an uncertain heroin deal with Perna and Malizia, it was nevertheless admissible as proof of the existence of the conspiracy and appellants' attempts to revitalize it. See *United States* v. *Frank*, 494 F.2d 145, 155-56 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974); *United States* v. *DeSapio*, *supra*, 435 F.2d at 283-84.

tion by the Government as impeaching evidence relating to its several accomplice-witnesses. See *United States* v. *Rothman*, 463 F.2d 488, 490 (2d Cir.), *cert. denied*, 409 U.S. 956 (1972); *United States* v. *Silverman*, 430 F.2d 106, 125 (2d Cir.), *modified on other grounds*, 439 F.2d 1198 (2d Cir. 1970), *cert. denied*, 402 U.S. 953 (1971); *United States* v. *DelPurgatorio*, 411 F.2d 84, 87 (2d Cir. 1969). Examples of such impeaching evidence cited by Stassi and claimed to have prejudiced him are the following three incidents: "[T]he existence of a completely separate drug conspiracy involving only Perna, Verizino [sic], Condello and Malizia" (A. Stassi Br. at 34-35);* "Perna's Plot to kill Verizino [sic] with the assistance of Condello and Agent Bradley" (A. Stassi Br. at 37-38); and Verzino's arrest "in possession of 26 pounds of heroin, which he obtained from a source other than the defendant." (A. Stassi Br. at 35).

That Stassi's trial counsel recognized the propriety as well as the Government's purpose in eliciting such impeaching evidence from its accomplice-witnesses is

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* Stassi also cites to several transactions elicited as part of the overall independent conspiracy involving Perna, Verzino, Malizia and Condello: Condello "received 1000 pills from Perna" (A. Stassi Br. at 35); Condello "received 25 pounds of marijuana from both Perna and Malizia" (A. Stassi Br. at 35); Condello purchased one-eighth kilogram of heroin each week from Perna. (A. Stassi Br. at 35); and, when arrested, Perna was in possession of 20 pounds of heroin.

What Stassi fails to acknowledge anywhere in his argument is that at the time of trial, Perna and Verzino were both under indictment in the State of New York for the conspiracy with Malizia to sell drugs in 1973-74. In fact, Verzino had already pleaded guilty to that conspiracy as well as a number of substantive charges, including possession of the 26 pounds of heroin referred to by Stassi, and was awaiting sentence. Perna had not pleaded guilty to the New York State charges at the time of trial but had pleaded guilty in Federal Court for his possession of the 20 pounds of heroin referred to by Stassi, and was awaiting sentence. In addition, Perna was under indictment in this Court for his escape from the Federal House of Detention and, at the time of trial, had agreed to plead guilty to the charge.

plainly evident from counsel's failure to register any objection below when that evidence was brought out. In fact, as this Court might well expect, Stassi's counsel, as well as other trial counsel, took up where the Government left off. Each extensively cross-examined Perna, Verzino and Condello about these particular criminal activities.

For example, Perna was subjected to a lengthy cross-examination about these independent criminal activities by all counsel. As a matter of trial strategy, each counsel concluded this line of cross-examination eliciting from Perna the telling admission that appellants were not involved with Perna in these activities.

The utter hollowness of Stassi's claim here is best evidenced by noting that trial counsels' cross-examination of Perna went far beyond the Government's direct examination which merely exposed a skeletal outline of the major crimes committed by Perna. Counsel brought out that Perna, Verzino and Malizia in the course of their conspiracy in 1973-74 made at least 100 sales of heroin ranging from a minimum of 1/8 kilogram to a maximum of 10 to 12 kilograms. Additional crimes brought out on direct, without objection, and subjected to repeated and lengthy cross-examination were Perna's conviction in 1952 of desertion and escape from an Army stockade, his convictions in 1957 of narcotics and armed robbery, and his conviction in 1974 for a conspiracy to import cocaine from South America.

Equally compelling in analyzing the hypocrisy of Stassi's claim is the fact that trial counsel were not content with limiting their cross-examination to merely expanding the impeaching evidence brought out initially on direct examination. Counsel fully utilized the *3500* and *Brady* material to cross-examine Perna in detail about his partnership with Verzino in Atlanta selling narcotics to inmates; his successful effort in 1974 to escape

from the Federal House of Detention using a Catholic priest; and his attempt in 1972 to establish a cocaine connection in Peru. Of course, an equally searching cross-examination was conducted by counsel to impeach Verzino and Condello. In the face of that kind of cross-examination below, which branded Perna, Verzino and Malizia as distributors of literally hundreds of kilograms of heroin, it is impossible to credit Stassi's accusation here that the Government's limited impeachment of it accomplice-witnesses improperly established "the criminal propensity of all the conspirators, including the defendants on trial, to engage in high-level narcotics activities." (A. Stassi Br. at 36).*

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* Tony Stassi also claims spill-over prejudice from evidence that Sorenson harbored Condello when Condello became a fugitive in September, 1973; that Sorenson offered to sell "cut" heroin to Perna and Malizia in September, 1973; and that Sorenson owned an "after hours" club. Since Stassi was not mentioned in this testimony, it is difficult to imagine how he was unfairly prejudiced by it. In any event, the evidence was properly received.

Sorenson's willingness to harbor Condello demonstrated to the jury not only that Sorenson was serious in his proposal to "cut out" Perna, Verzino and Malizia as customers for the 1973 shipment and replace them with Condello, but the jury could also have found that Sorenson's willingness to harbor Condello from the narcotics agents derived from his fear that Condello would do exactly what he did—expose the smuggling operation. See *United States* v. *Bynum*, *supra*, 485 F.2d at 498.

The question asked of Perna about Sorenson's spurned offer in October, 1973 to sell "cut" heroin to him and Malizia, as Stassi concedes, was withdrawn. What Stassi fails to reveal, however, is that Judge Knapp ruled that the Government could elicit the answer to that question, and the corroborating testimony of Condello about that offer, unless Sorenson's counsel agreed not to argue that Perna never received heroin from Sorenson *solely* because Sorenson was not a heroin dealer. Sorenson's counsel readily agreed, since that testimony obviously would have established quite the opposite of that inference. (Tr. 697-701).

Finally, Sorenson's ownership of the "after hours" club,

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Moreover, on virtually every occasion when any one of these three areas of criminal activities was the subject of testimony, Judge Knapp intervened to instruct or remind the jury that defendants were not involved in the commission of these crimes.

C. Association Of Appellants With Their Co-conspirators And With Others In 1973.

Tony Stassi's second major objection to the Government's post-1972 evidence is that he was prejudiced by "the Government's proof that he had been under surveillance by various law enforcement officials even after his indictment in this case." (A. Stassi Br. at 38).* Taking Stassi at his word that this surveillance was "clearly innocuous" (A. Stassi Br. at 38), it is difficult to comprehend how, as he now claims, he was prejudiced by Judge Knapp's ruling permitting the Government to introduce that surveillance evidence. Regardless of the inconsistency of his position, however, Judge Knapp, in admitting this evidence, was acting well within the broad discretion afforded a trial judge to permit the introduction of circumstantial evidence tending to prove any disputed issue. See *Williamson* v. *United States*, 207 U.S. 425, 451 (1908); *Chime* v. *United States*, 159 U.S. 590, 593 (1895); *Clark* v. *United States*, 293 F. 301, 305 (5th Cir. 1923).

For example, former DEA Agent LeCate's testimony that in November and December, 1973 he had observed

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scarcely a brazen violation of the law, was relevant to corroborate the telephone number of that club seized from Perna which was marked "AH". Further, Condello and Perna only knew it as Sorenson's after hour place and not by its more euphemistic name —Y or D Social Club.

* The indictment referred to is the original sealed indictment filed in April, 1973, not the superseding indictment on which Stassi was prosecuted.

Tony Stassi on several occasions going to and from Carol Hoover's Florida residence circumstantially linked Tony Stassi to Joseph Mirabella, whose residence at 23 Holly Place in Larchmont was the delivery point for the Citroen. Mirabella's 1973 telephone toll records reflected two long distance calls in June to Carol Hoover's Florida residence.*

Similarly, Sergeant Gillespie's testimony that in June, 1973 he had observed Tony Stassi travel from LaGuardia airport to 253 West 72nd Street in Manhattan, then to the Evergreen Bar in Brooklyn where he met outside with Sorenson, and later back to 253 West 72nd Street was relevant circumstantial evidence that Tony Stassi maintained a residence at the Westover Hotel located at 253 West 72nd Street and was an associate of Sorenson. The relevance of Stassi's association with Sorenson is too obvious to require argument.** See *United States* v.

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* This circumstantial evidence ultimately became unnecessary for that limited purpose, when Mirabella testified as a defense witness and admitted knowing Tony Stassi. However, the tolls immediately became useful for a different purpose—to impeach Mirabella's testimony that his acquaintance with Tony Stassi was so slight that he did not even know Tony Stassi's Florida girlfriend, Carol Hoover. His telephone records left quite a different impression.

It should also be pointed out that the Government's direct evidence merely brought out that LeCate had "observed" Stassi on several occasions coming in and out of Hoover's residence. It was on cross-examination that counsel brought out, at the suggestion of Tony Stassi on the record, that Stassi took a boy to a hamburger stand on one of those occasions. (Tr. 1742-72).

** It should be noted that Gillespie's testimony was one of the few pieces of evidence which tied Tony Stassi and Sorenson together independent of the accomplice testimony. Moreover, it circumstantially established that Tony Stassi's telephone number for a "salon" found on a card in his possession when arrested was a telephone number to reach Sorenson, since the telephone number

[Footnote continued on following page]

Diggs, 497 F.2d 391, 394 (2d Cir. 1974), *cert. denied*, 419 U.S. 861 (1975). As to proof of the trips back and forth to 253 West 72nd Street, it was necessary to establish that telephone numbers seized from Verzino when arrested were numbers for reaching Tony Stassi, as Verzino testified below. To do this required proof that Tony Stassi maintained an apartment at the Westover Hotel where the telephones were located. However, Stassi's residence at the Westover Hotel could not be conclusively established by the hotel records, because Stassi's apartment was maintained under his alias Tony Rogers. Moreover, the telephone numbers at that apartment were listed in his wife's alias, Doris Kay. Thus, by a complex circle of circumstantial facts derived from all the evidence above, plus additional testimony that Tony's wife was named Doris, the Government was able to establish the ultimate fact—that it was Tony Stassi's telephone number in Verzino's address book.*

Having established what all this circumstantial evidence was designed to prove, it leaves open only the issue of the relevance of that proof. Here, the relevance of that evidence was generally to corroborate Verzino's claimed relationship with Joe and Tony Stassi, and, far more significantly in light of Joe Stassi's defense, to corroborate Verzino's testimony that he and Joe Stassi had not been estranged ever since the Summer of 1973 by any alleged homosexual incident, or that Verzino was testifying against Stassi to get revenge as a result of that alleged incident.

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was that of the Evergreen Bar. It also aided in showing the jury that the other telephone numbers Stassi had under the names "Bill" and "Bob" were coded numbers for Sorenson, who lived at and paid the rent for the apartments where those telephone numbers were subscribed to under other names.

* To be sure a stipulation to that ultimate fact would have eliminated the need for introducing all the circumstantial evidence. A stipulation was never offered by the defense.

Furthermore, again Judge Knapp instructed the jury here, as he did on virtually every occasion, that when circumstantial evidence of this kind was admitted, it was for the limited purpose of establishing an association which the jury might or might not find relevant.* Specifically, Judge Knapp instructed the jury on this occasion:

> "I just want to call to your attention that this particular testimony is coming in for a very limited purpose. It is merely in to show, as I told you, association, you can give that whatever value you think it deserves." (Tr. 1767-68).**

Judge Knapp properly admitted the surveillance evidence with appropriate cautionary instructions to the jury concerning the limited purpose for which it was admitted.

Stassi's final objection is to the admission of his passport application and his telephone toll records, as well as the toll records of Joseph Mirabella, Carol Hoover, Salvatore Autera and Isaac Franklin. Like his previous objections, this objection also reflects a failure to appreciate the limited purposes for which this documentary evidence was properly offered and received.

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* Stassi's claim that such association evidence should have been excluded altogether because it was outside the conspiracy period is based upon two misconceptions. First, as previously shown, the conspiracy existed in 1973; and second, evidence of post-conspiracy association is admissible. *Cf. United States* v. *Diggs, supra,* 49 F.2d at 394; Fed. R. Evid. 402.

** Contrary to the suggestion in Stassi's Brief that the Government's surveillance evidence conveyed to the jury a "sinister impression" of Stassi (A. Stassi Br. at 40), the Government not only limited the surveillance testimony on its direct examination, but Judge Knapp cautioned the jury at defense counsel's urging not to speculate that such observations might have some sinister connotation. (Tr. 1768).

Mirabella's, Autera's and Carol Hoover's telephone records were admitted into evidence as part of the overall circumstantial evidence linking Tony Stassi to Mirabella, whose residence across the street from Autera's residence served as the unloading site for the Citroen. To summarize, Mirabella's 1973 toll records reflected telephone calls to Hoover's Florida residence and to Autera's Larchmont residence; and his 1975 toll records reflected telephone calls to Stassi's Florida residence and to Autera's Florida residence.* The telephone records of Stassi, Autera and Hoover were, of course, necessary to prove that the telephone numbers reflected on Mirabella's tolls belonged to Stassi, Stassi's associate Autera and Stassi's girlfriend Hoover.

Regarding the relevance of Isaac Franklin's telephone records, it must initially be mentioned that Perna and Verzino both testified that Joe and Tony Stassi informed them that Isaac "Buddy" Franklin, Stassis' personal lawyer, could be used as a means of contact. Franklin's telephone number, which characteristically was not listed in his name but under the name of "United States R. V. Systems, Inc.," was another of the "Stassi" telephone numbers contained in Verzino's address book and, therefore, was relevant for both the general and specific purposes previously referred to in the response to Stassi's objection to the surveillance testimony of Sergeant Gillespie.

Stassi's objection to the admission into evidence of his 1969 and 1974 passport applications is not even supported by the cases he cites. In fact, *United States* v. *Bennett*,

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* As was previously noted, Mirabella testified on behalf of Tony Stassi and, on cross-examination, denied making the calls but was unable to explain the presense of these documented telephone calls to Stassi or Hoover from his telephone.

409 F.2d 888 (2d Cir.), *cert. denied sub nom. Jessup* v. *United States*, 369 U.S. 852 (1969) and *United States* v. *Mallah*, *supra*, support Judge Knapp's ruling admitting the passport application.

In *Bennett*, this Court held that heroin seized upon the arrest of a co-conspirator at Customs, after the conspiracy, was admissible as an act from which the jury could infer the existence of the previous smuggling conspiracy and the co-conspirator's membership therein as an experienced courier. *United States* v. *Bennett*, *supra*, 469 F.2d at 893.

Similarly, in *Mallah*, this Court held that heroin-testing thermometers seized from a defendant upon his arrest, after the termination of the conspiracy, were properly admitted as evidence of the existence of the narcotics conspiracy and defendant's membership therein. *United States* v. *Mallah*, *supra*, 503 F.2d at 980-81.

A fortiori, Stassi's passport applications, which revealed his possession from 1969 to 1974 of the indispensable means to conduct a successful smuggling operation between France and the United States was admissible, especially in light of the proof that it was Stassi's function to travel to France and negotiate for the heroin. See also *United States* v. *Ravich*, 421 F.2d 1196, 1204 (2d Cir. 1970).

D. Related Crimes Committed During The Conspiracy.

Judge Friendly's opinion in *Bennett* also undercuts Stassi's subsidiary objection to the admissibility of Perna's testimony that at the February, 1973 meeting at the Casa del Monte, Tony Stassi informed Perna and Malizia that he had recently taken a trip to Mexico to negotiate for heroin but had ultimately rejected the deal because of Mexico's heroin-processing technique. Plainly,

Stassi cannot be heard to complain that his own efforts to find an alternate source for pure heroin to smuggle into the United States was beyond the scope of the overall smuggling conspiracy as *he* understood it. *United States* v. *Bennett*, *supra*, 409 F.2d at 893. See *United States* v. *Bynum*, *supra*, 485 F.2d at 498.

In the same vein, Judge Mulligan's opinion in *United States* v. *Bynum*, *supra*, undermines Stassi's remaining evidentiary objection—that he was unfairly portrayed as a man involved in "multi underworld activities" by testimony revealing that he had lost $15,000 at a racetrack,* that he was indebted to loan sharks to the tune of $22,000,** and that he contemplated purchasing a ranch in Arizona. (A. Stassi Br. at 36). As Judge Mulligan so aptly stated, in *United States* v. *Bynum*, *supra*, rejecting defendant's claim of prejudice arising out of the Government's proof at trial of murder plans and robberies committed during the course of that narcotics conspiracy:

> "The appellants, here were engaged for profit in a major hard drugs venture in Harlem which not only dehumanized its ultimate customers but unquestionably spawned myriad crimes in a community already misery-ridden. No jury in New York can be unaware of the dimensions and consequences of the major operation which was graphically portrayed here. The revulsion of the

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* Stassi neglects to mention that Perna's testimony about this incident in full was not that Tony lost $15,000 at the race track, but that Malizia told Perna that, in 1971, Malizia had *loaned* Stassi that amount at a race track in Florida and asked Perna, in February, 1973, to meet with Stassi, which Perna did that same month, to enable Malizia to be repaid and to see about purchasing any future heroin shipments.

** Stassi neglects to mention that this one line of testimony in the record was stricken upon the Government's consent. (Tr. 1110).

> average citizen to this traffic need not be documented. How evidence of the concomitant robbery, assault or even planned murder here could be so exacerbating as to render the jury's judgment irrational, we are unable to understand. We are not dealing with minor league addicted street pushers but with well-financed brazen professionals engaged in a large-scale criminal undertaking in which corruption and violence are endemic."

In the context of this case, which revealed an unprecedented heroin-smuggling operation rife with its own share of violence and corruption, it is equally preposterous to take seriously Stassi's claims that these three crimes—peccadillos by comparison—so prejudiced his trial as to require a reversal of his conviction. See also *United States* v. *Bozza*, 365 F.2d 206, 214 (2d Cir. 1965).

In brief, everyone of Sorenson's and Stassi's objections to the post-1972 evidence, whether analyzed separately or collectively, are devoid of merit and do not support, let alone require, granting them a new trial.*

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* To avoid needless repetition, we would point out to the Court that the above discussion in this point fully answers Sorenson's allegations in Point II of his Brief that the Government's trial proof exposed ten conspiracies, not one, and Judge Knapp erred in refusing to grant a new trial on that ground.

A comparison of nine of the ten purported conspiracies Sorenson alleges were part of the Government's proof below reveals that each so-called conspiracy is nothing more than a restatement of his and Tony Stassi's frivolous objections to the post-1972 evidence, which are fully answered herein.

As to the other one of the ten purported conspiracies—"A conspiracy to distribute narcotics involving Albert Pierro (Albaduce) and Ernest Malizia involving several loads of heroin and one-half million dollars in cash" (Sorenson Br. at 36)—the reference is to that part of Perna's testimony that in February,

[Footnote continued on following page]

1973, when he joined with Malizia to sell heroin, Malizia told Perna that he had received the two shipments of 120 and 140 kilograms in 1970 but, because he went into hiding in 1971, did not know about any shipments in 1971, except that Pierro had purchased some shipments without Malizia's knowledge with the half million dollars Malizia had left with Pierro for that purpose. The principal relevance of that testimony was to explain why Perna did not learn from Malizia of Mastantuono's June, 1971 delivery of 80 kilograms to Stassi and Sorenson at Pierro's New Jersey residence.

Moreover, Sorenson's reliance on *United States* v. *Bertollotti*, 529 F.2d 149 (2d Cir. 1975) as support for his multiple conspiracy claim is not the least compelling. The vital inquiry under *Bertollotti*, as Sorenson concedes, is "whether the evidence reflects a 'primarily ongoing business venture or a series of separate transactions and agreements.'" (Sorenson Br. at 38). That inquiry must be answered in the affirmative here, since every one of the ten criminal transactions cited by Sorenson which was not elicited as impeaching evidence, arose out of the unceasing efforts of the defendants and co-conspirators to obtain heroin in France for distribution in New York.

In any event, Judge Knapp's charge disposes of Sorenson's contention. Judge Knapp's conspiracy charge clearly removed the likelihood that the jury might convict Sorenson for membership in some conspiracy other than the conspiracy charged in Count One. Judge Knapp specifically instructed the jury:

> "The conspiracy with which we are concerned is claimed to have been hatched in the Atlanta penitentiary in the spring of 1970, where Perna, Verzino, Otvos and the defendant Joseph Stassi are claimed to have conceived the plan of exploiting a certain contact in France, namely, one Jean Guidicelli, or, the "Uncle," with whom Otvos is claimed to have done business. This conspiracy, as I say, is claimed to have been hatched inside the prison. It is further claimed that Joseph Stassi recruited his brother Anthony to go to France to make necessary arrangements with the "uncle." It is also claimed that the defendant Sorenson when he got out of jail and the defendants Anthony Stassi and Charles Alaimo, among other people, were concerned with receiving and distributing the heroin. In brief, the accusation with which we are dealing concerns only heroin which may have been imported into the

[Footnote continued on following page]

United States as a result of the plan claimed to have been hatched in the Atlanta penitentiary to exploit Otvos' connection with the Frenchman known as the "uncle." Now, that is the conspiracy and the only conspiracy with which these defendants are charged.

I emphasize the word "only" because you have heard a great deal of testimony about other illegal acts in which one or more of the government's witnesses were concededly engaged and in which one or the other of the defendants, except Alaimo, might possibly have been involved. However, the defendants are charged only with the particular conspiracy I have outlined, and it is only that of which any of them can be convicted. *So if it should be your frame of mind as to any defendant that you have a reasonable doubt as to his guilt of the conspiracy I have outlined, but you are dead certain that he had committed some other crime, it would be your absolute duty to acquit such defendant.* The reason for that is obvious. This conspiracy is all any defendant has been charged with. There is no way we can tell what defenses might have been interposed had some other illegal conduct been charged in the indictment. Defense counsel in this case were responsible only for meeting the charge in the indictment. *If as to any defendant or defendants you have a reasonable doubt on that charge, such defendant or defendants is or are entitled to your verdict of acquittal.*" (Tr. 3962-64) (Emphasis added.)

This Court's recent decision in *United States* v. *Tramunti*, 513 F 2d 1087, 1107-08 (2d Cir.), *cert. denied*, 44 U.S.L.W. 3201 (U.S. Oct 6, 1975), which held that a virtually identical charge was adequate to overcome multiple conspiracy claims serves here to completely dispose of Sorenson's multiple conspiracy contention.

POINT IV

Judge Knapp Correctly Found That Mastantuono's Identification Of Sorenson Was Not The Result Of An Impermissibly Suggestive Photographic Display.

Sorenson attacks as error Judge Knapp's finding below that Mastantuono's selection of Sorenson's photograph from two different arrays shown to him on separate occasions in February and March, 1975 "was in no way the result of suggestion." (Tr. 2099). Judge Knapp's finding is fully supported by all the facts and circumstances adduced below.*

Sorenson launches his main attack on Judge Knapp's finding claiming that in the first array of 22 photographs shown to Mastantuono in February, 1975 (GX 3),** his photograph was suggested to Mastantuono by several "unique" features not possessed by any other photograph. When viewed among and compared against the other 21 photographs in that array, the claimed "unique" features are not confined to Sorenson's photograph. More importantly, Mastantuono's selection of two other photographs from that same array, which completely lacked the so-called "unique" features, nullifies Sorenson's suspicion that those features impermissibly influenced Mastantuono's selection of his photograph.

The essence of Sorenson's claim is that his photograph was set apart from every other photograph by three sim-

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* Judge Knapp made his finding after a full hearing at which the Government called Mastantuono, Agents Bocchichio and Bradley, and Assistant United States Attorney Harry C. Batchelder. (Tr. 1872-2099).

** Government's Exhibit 3 is a manila folder containing 22 photographs and Xerox copies of photographs of various individuals, each appearing on a separate page in the folder.

ilarities it alone had with the photograph of Tony Stassi, who Mastantuono had previously identified from other photographs. The claim is factually inaccurate and, even when corrected, it is based upon sheer speculation.

The first similarity adverted to by Sorenson is that his and Stassi's photograph were xerox copies of photographs. Since that is true of 16 of the 22 photographs in the folder, that circumstance cannot possibly be construed to have had any suggestive influence on the selection process.

The second and third similarities relied on by Sorenson are that his and Tony Stassi's photographs were the only photographs which were not securely attached to the folder pages and appeared one after the other.* Although at first blush these similarities appear more substantial, they are not. In the first place, Sorenson is mistaken

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* Sorenson's claim that, because the two photographs were not attached to the page, they "were shown loose" to Mastantuono is misleading. (Sorenson Br. at 48) They were not removed from the folder when shown but were wedged into the top of the folder and, like every other photograph, individually shown as part of the folder. (Tr. 1879-82, 1896, 1899-1902, 1939, 2000-02) Although Sorenson correctly points out that Agent Bocchichio testified that Sorenson's photograph became unwedged and fell out, and that Bradley said to Bocchichio about Sorenson's photograph "that is Bubby," that happened *after* Mastantuono had selected Sorenson's photograph. The insignificance of that event is demonstrated by the fact that Agent Bradley did not recall that Sorenson's photograph fell out. (Tr. 2015-16). Moreover, its lack of any striking significance is also revealed by the fact that Sorenson's attorney did not even question Mastantuono about either event. However, although Mastantuono was not directly questioned about either event, it is important to cite Mastantuono's testimony on cross-examination that when he was shown photographs in the file folder no one said anything to him and never indicated to him that his selections were "good choices." (Tr. 2047, 2095-96).

that only his photograph had these two common characteristics with Stassi's photograph. Another identically Xerox-copied photograph in the folder—that of a man named Donald Compitello—was likewise not attached to the page, and it appeared only one page after Stassi's photograph (Tr. 2009-10). Significantly, it was not selected by Mastantuono.*

More significant than the fact that Compitello's photograph bore the very same characteristics as Sorenson's photograph, and was not selected by Mastantuono, is the fact that Mastantuono simultaneously selected from the folder photographs of defendants Consalvo and Alaimo as the other drivers of the Cadillacs which escorted the Citroen. Both photographs have *none* of the features Sorenson here alleges suggestively influenced Mastantuono to select his photograph. They are regular photographs; they are attached to the folder pages; they appear in the folder far apart from each other and from Stassi's and Sorenson's photographs; and they are completely unmarked. In the face of such a dichotomy in Mastantuono's selection of photographs, it is utter speculation to claim, as Sorenson does here, that his photograph was selected by Mastantuono because of two or three distinguishing characteristics which counsel was able to discern after a careful scrutiny of the entire array.

In fact, Sorenson's entire challenge to the first array, and for that matter to the second array of 18 loose photographs out of which a different photograph of Sorenson

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* Compitello's photograph also disposes of Sorenson's other mistaken allegation that his photograph was "marked in unique fashion" because it had writing on the front, unlike any other photograph. (Sorenson Br. at 57). Compitello's unselected photograph was similarly "marked" by writing on its front.

was selected by Mastantuono in March,* is based upon needless surmise. That is so, because counsel refrained from cross-examining Mastantuono at the hearing about the influence, if any, that any of these characteristics now complained of might have had on his selection of Sorenson's photograph. Despite that failing, however, it was manifest from Mastantuono's testimony, as Judge Knapp found, that nothing in either array or in the procedure used in showing the array to Mastantuono suggested Sorenson's photograph was a desired choice. Indeed, at the hearing below, Judge Knapp was afforded the opportunity to personally observe Mastantuono go through each of the two photographic arrays a second time, again selecting Sorenson's photograph, as well as the photographs of Consalvo, Alfano and Stassi. Judge Knapp also heard Mastantuono's telling admissions on cross-examination that he had no recollection whether he had previously seen the defendants' photographs which he had just selected from both arrays at the hearing. (Tr. 2032-42, 2047, 2049-51, 2056-57, 2087-88). In fact, hearing Mastantuono's explanation to Sorenson's counsel why he was unable to recall previously seeing Sorenson's xerox photograph in the folder, completely warranted Judge Knapp's finding that Mastantuono's ability to identify Sorenson was in no way impermissibly suggested by any photographs:

> "Q. When you looked through this volume I believe you testified earlier that you selected that photograph.

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* Although Sorenson challenges this second photographic array as impermissibly suggestive, the challenge is limited to the presence of a smear on the lower corner of Sorenson's photograph. (GX 2). That characteristic, common to other polaroid photographs contained in the array, is clearly insufficient to overturn Judge Knapp's implicit finding that, like the first array, the second was not impermissibly suggestive.

The Court: What is the number on the top of that?

Mr. Naden: No. 22 [Sorenson's Photograph].

Q. Did you select that photograph?

A. This picture is a real problem, but it is really a bad picture and I seen so many pictures.

Q. Is it your testimony now that you are not certain whether this photo, No. 22, is a photograph of any person that you recognized?

A. No, *I know I have seen him. I recognize him.* But you are asking me if I picked out this picture before.

The Court: That is what he can't remember.
The Witness: This I cannot remember.

Q. You can't remember whether or not you picked out the photo before?

A. I don't think so. I don't think I had seen this picture before." (Tr. 2087-88) (emphasis added).*

Even assuming that Judge Knapp erred in finding that the photographic identification of Sorenson was not impermissibly suggestive—an assumption we submit is plainly unsupportable—there could not be error if a sufficient independent source for the identification were found to

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* Of course in reaching his conclusions below, Judge Knapp was fully aware that Mastantuono had viewed literally hundreds of photographs between August, 1972 and February, 1975 and had never identified anyone else as the drivers of the Cadillacs. That single circumstances is itself a compelling factor in making a determination whether an identification was the result of an impermissibly suggestive photographic array. See *United States* v. *Mims*, 481 F.2d 636, 637 n.5 (2d Cir. 1973); *United States ex rel. Smiley* v. *LaVallee*, 473 F.2d 682, 683 (2d Cir.), *cert. denied*, 412 U.S. 952 (1973).

exist wholly apart from the challenged identification. The vital concern is, of course, that there be no irreparable misidentification. *Neil* v. *Biggers*, 409 U.S. 188 (1972); *United States* v. *Burse*, 531 F.2d 1151, 1185 (2d Cir. 1976); *United States* v. *Yanishefsky*, 500 F.2d 1327, 1330 (2d Cir. 1974); *United States ex rel. John* v. *Casscles*, 489 F.2d 20, 23 (2d Cir. 1973), *cert. denied*, 416 U.S. 959 (1974); *United States* v. *Mims*, *supra*, 481 F.2d at 637; *United States ex rel. Phipps* v. *Follette*, 428 F.2d 912, 914-15 (2d Cir.), *cert. denied*, 400 U.S. 908 (1970).

Here, there was ample evidence of an independent source for Mastantuono's identification. Aside from his trial testimony, Mastantuono testified at the hearing that he saw Sorenson on two occasions: in September, 1970 when he delivered the Citroen, and in June, 1971, when he delivered the stationwagon.

Mastantuono's testimony was that in September, 1970 he first observed Sorenson driving a white Cadillac as part of the escort for the Citroen. He saw Sorenson in the white Cadillac four or five different times, as Sorenson passed back and forth of the Citroen on the way to Larchmont. Mastantuono later saw Sorenson at 23 Holly Place, when Sorenson got out of the white Cadillac, opened the trunk and placed the four suitcases full of heroin inside. (Tr. 2059-60, 2092-93).

Mastantuono's testimony about the June delivery was that he saw Sorenson inside Pierro's garage when he delivered the 80 kilograms of heroin concealed in the stationwagon. On that occasion, he saw Sorenson for about three to four minutes standing six to eight feet away. (Tr. 2052-53).

In cases involving suggestive pre-trial identifications, this Court has found a sufficient independent source for

an in-court identification where the witness had otherwise observed the defendant for no more than a minute or two. See, e.g., *United States* v. *Kaylor*, 491 F.2d 1127 (2d Cir. 1973) *vacated on other grounds sub nom. United States* v. *Hopkins*, 418 U.S. 909 (1974); *United States* v. *Mims*, *supra*, 481 F.2d at 637. A finding of an independent source for Mastantuono's identification of Sorenson follows *a fortiori* from those cases. See also *Neil* v. *Biggers*, *supra*; *United States ex rel. Gonzalez* v. *Zelker*, 477 F.2d 797 (2d Cir. 1973); *United States ex rel. Smiley* v. *LaVallee*, *supra*; *United States* v. *Counts*, 471 F.2d 422 (2d Cir.), *cert. denied* 411 U.S. 935 (1973); *United States ex rel. Bisordi* v. *LaVallee*, 461 F.2d 1020 (2d Cir. 1972); *United States* v. *Fernandez*, 456 F.2d 638 (2d Cir. 1972). It is also significant that Mastantuono's identification of Sorenson was unshaken by cross-examination. *United States* v. *Yanishefsky*, *supra*, 500 F.2d at 1330-31; *United States ex rel. Gonzalez* v. *Zelker*, 477 F.2d 797, 803 (2d Cir.), *cert. denied*, 414 U.S. 924 (1973).

Furthermore, in deciding whether Mastantuono may have misidentified Sorenson, the Court may consider any other evidence adduced at the trial connecting Sorenson to the conspiracy. *E.g.*, *Brathwaithe* v. *Manson*, 527 F.2d 363 (2d Cir. 1975), *cert. denied*, 96 S.Ct. 1737 (1976); *United States* v. *Reid*, 517 F.2d 953, 967 (2d Cir. 1975); *Haberstoch* v. *Montayne*, 493 F.2d 483, 485 (2d Cir. 1974); *United States* v. *Bynum*, *supra*, 485 F.2d at 504. Here, the evidence implicating Sorenson in the conspiracy was nothing short of staggering. Without reviewing all of that evidence, it is sufficient to recall that Perna, Verzino and Condello each independently identified Sorenson as a key member of the conspiracy. In addition, there was particularly damaging evidence directly linking Sorenson to Mastantuono's two deliveries—most dramatically, Sorenson's matching gold lighter.

There was also a pecular twist in this case which deserves some mention. Sorenson was not identified at trial by Mastantuono in the more traditional style. Rather, as a matter of trial strategy, Sorenson removed himself from the defense table before Mastantuono appeared and seated himself among the spectators in the audience.* When Mastantuono took the stand, he identified Stassi and Alaimo, who remained seated at the defense table; he then stepped down, and went into the rear of the courtroom and identified Sorenson.

POINT V

Judge Knapp Acted Well Within His Discretion In Refusing To Grant A New Trial Based Upon An Unexpected Incident When Two Plainclothes Officers Entered The Courtroom With A Witness.

Sorenson complains he was "extremely prejudiced" by the incidence of two plainclothes officers entering and leaving the courtroom with Detective Molfetta, a witness for the Government. The alleged prejudice, if any, was *de minimus* and Judge Knapp properly denied a new trial on that ground.**

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* For the sake of clarity, it should be noted that defendants voluntarily absented themselves from the *Simmons* hearing to leave open the option of later choosing to sit in the audience to test Mastantuono's ability to identify them. (Tr. 1978-79).

** Sorenson implies in his argument on this issue that he made a motion for a mistrial when this incident occurred. Although Judge Knapp assumed appellants had done so at the time he denied their post-trial motions on this ground, in fact they had not. All that had happened was that, at the end of the day when the incident occurred, Sorenson's counsel informed Judge Knapp that Sorenson had been "troubled" by the incident. He

[Footnote continued on following page]

In their post-trial motions appellants sought a new trial claiming, as Sorenson does here, that this unexpected incident at the trial severely prejudiced them. Rejecting that claim and appellants' characterization of the incident, Judge Knapp made the following observation:

> "The Malfetta incident, all I can say about that is what I said at the time. I don't think the jury noticed it and did not draw any inferences from it.
>
> * * * * *
>
> Two people walked in and walked out." (Tr. 4059-60).*

Having failed to persuade the trial judge who observed the incident first-hand of its alleged prejudicial nature, Sorenson now seeks to convince this Court, alleging that the incident is akin to shackling a defendant in the presence of the jury. Even accepting that manifestly exaggerated characterization, the decisions cited in Sorenson's Brief—*Glasser* v. *United States*, 315 U.S. 60 (1942); *Guffey* v. *United States*, 310 F.2d 753 (10th Cir. 1962); *DeWolf* v. *Waters*, 205 F.2d 234 (10th Cir.), *cert. denied*, 346 U.S. 837 (1953)—rather than supporting his claim for a new trial support the opposite conclusion that a new trial is not required even in instances where a defendant is brought in manacles into the courtroom, while the jury is present. See also,

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did not request any relief. (Tr. 2663). Sorenson can not be permitted to risk a jury verdict and then, when it turns out to be adverse, turn around and argue that he suffered incurable prejudice. See *United States* v. *Calles*, 482 F.2d 1155, 1162 (5th Cir. 1973); *Ladakis* v. *United States*, 283 F.2d 141, 143 (10th Cir. 1960).

* When Sorenson's counsel originally mentioned Sorenson's complaint about the incident, Judge Knapp's characterization of the incident was the same. (Tr. 2663).

United States v. *Greenwell*, 418 F.2d 846, 847 (4th Cir. 1969). It inexorably follows that a new trial is not required in the instant case, where the incident involves, at worst, an unexpected infraction of courtroom decorum not involving Sorenson.

In any event, since, as Sorenson concedes, Detective Molfetta's testimony did not pertain to any illegal activities but was limited to establishing Sorenson's places of residence, businesses and telephone numbers, and his association with Consalvo, it is purely speculative to assume that the jury drew any untoward inferences against Sorenson.

POINT VI

The Government's Initial And Rebuttal Summations Were Entirely Proper.

Appellants attack the manner in which the credibility of the accomplice witnesses—especially Perna, Verzino, Condello and Mastantuono—was dealt with in the Government's summations. (J. Stassi Br. at 42-44; A. Stassi Br. at 65-69; Sorenson Br. at 39-40). Their arguments are based on omissions, distortions and misstatements of the record.

A. Appellants' Use Of The Cooperation Agreements At Trial And Their Failure To Object To Their Introduction Preclude The Arguments They Now Assert

Each of the accomplices had an agreement with the Government covering his cooperation. Perna's written agreement (GX 1), which was similar to Verzino's oral agreement, and which Judge Knapp rightly called "per-

fectly routine" (Tr. 4067), provided among other things that the agreement would be "null" if "in the opinion of" the Government Perna did not testify "truthfully." (GX 1, ¶¶ 1, 2 & 12). Condello's and Mastantuono's agreements, which were oral, were substantially different, since they had commenced their cooperation long before the trial.

The provisions of Perna's and Verzino's cooperation agreements played a key role in the defense strategy at trial. Relying on them, appellants throughout the trial laid a foundation to ultimately argue to the jury that the accomplices were fabricating their testimony against the defendants because that is what would constitute testifying "truthfully . . . in the opinion of the Government. For example, based on the agreements, Perna was cross-examined about his concern "to please Nesland [the Assistant United States Attorney]" and to have the Government believe his testimony. (Tr. 459-63, 657, 712-14). Indeed, defense counsel objected when the prosecutor asked Perna on redirect what effect perjury would have on his agreement, claiming that the prosecutor's question was improper unless phrased in terms of whether the "U.S. Attorney's Office thinks he lied." (Tr. 711). Moreover, when the Government did not bring out the full text of Verzino's agreement, omitting provisions identical to paragraphs 1, 2 and 12 now complained of, defense counsel used a transcript of Verzino's agreement to demonstrate during cross-examination that Verzino's agreement was identical to Perna's agreement. It was conditioned on telling the truth—the truth itself being what the Government's "opinion" allowed. (Tr. 1549-52).

Having made an unsuccessful strategic decision to employ these agreements to their advantage, appellants cannot now turn around and be heard to complain that the introduction of these "opinion" provisions

amounted to impermissible Government vouching for its witnesses. See *Estelle* v. *Williams*, 44 U.S.L.W. 4609 (U.S. May 3, 1976); *United States* v. *Mariani*, Dkt. No. 76-1075, slip op. 5045, 5052-55 (2d Cir. July 19, 1976). A defendant cannot be permitted to "invite" error. See *United States* v. *Valdivia*, 492 F.2d 199, 204 (9th Cir.), *cert. denied*, 414 U.S. 801 (1973); *United States* v. *LeVison*, 418 F.2d 624, 626-27 (9th Cir. 1969); *United States* v. *Bramson*, 139 F.2d 598, 600 (2d Cir. 1943).

Even if this were not enough to completely dispose of their claim, the appellants, consistent with their strategy below, made no objection to the receipt of the agreements in evidence (*e.g.*, Tr. 237-238) or, except for a passing reference by Sorenson * any objection based on a voucher theory until after the government's rebuttal summation. (Tr. 3934-3936). This failure to object was clearly a waiver of the point. See *Estelle* v. *Williams*, *supra*; *United States* v. *Indiviglio*, 352 F.2d 276, 280 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966). That is doubly so because, as a result of their failure to object until after the completion of the rebuttal summation, Judge Knapp "had no alternative" but to let the "wholly proper" rebuttal continue because to do otherwise "might have been undercutting exactly what you [the defense] had been trying to establish," namely, "an attack on the integrity of the prosecution and a charge that these defendants were being deliberately framed by the agents." (Tr. 4043-44).

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* Sorenson made an untimely objection to parts of paragraphs 1 and 2 of Perna's agreement, but not to the "opinion" part of the agreement, which was paragraph 12. (GX 1; Tr. 263-65). This was an inadequate objection. See *United States* v. *Pelose*, Dkt No. 76-1025, slip op. 4893, 4896-97 (2d Cir. July 12, 1976); Fed. R. Evid. 103(a)(1).

B. In Any Event, No Objection Was Taken To The Opening Summation And The Prosecutor's Comments Were Wholly Proper.

Even if it were found that the defendants' strategic decisions during the questioning of the witnesses did not bar an attack on the manner in which the cooperation agreements were dealt with in the Government's opening summation, the claim would have to be rejected. In substance, the contention is that the prosecutor improperly told the jury they would have to accept the accomplices' testimony as truthful because their "deals" with the Government were so "conditioned" and because a sentencing judge, in sentencing them, would consider whether they had "perjured themselves." This argument is constructed by wrenching a few words from their proper context in a portion of the prosecutor's discussion of the accomplices' credibility to which no pertinent contemporaneous objection was made. (Tr. 3669-3671). Even assuming the failure to object was not a waiver, the prosecutor's remarks were entirely unobjectionable.

The prosecutor began his opening summation by giving the jury "a brief summary of what the evidence shows and what the Government contends happened in this case." (Tr. 3668). He then turned to the credibility of the accomplices, a subject to which he returned again and again throughout the summation, and reminded the jury that the four principal accomplices were "lifelong criminals" who "have made their livelihood in crime" and "admitted the crimes they committed in the last 25 or 30 years." (*Id.*). Against this background, he made the first of the arguments to which appellants now object (Tr. 3668-70):

> "The issue of whether or not they are criminals is not here before you; the issue here is [not] whether or not they could or ever lied or perjured

themselves. That is obvious. But I submit to you on the evidence in this case it is just as obvious [that] what they told you from that witness stand happened, that it is the truth. You scrutinize their testimony and scrutinize the exhibits. You will find they are telling the truth. They are telling the truth because the rest of their lives depend on it. Their deals with the Government are conditioned upon their telling the truth.*

* * * * *

You recall Perna's and Verzino's deals. Those deals become null and void if they are shown to have perjured themselves and framed people in an attempt to get out.

What does that mean to them? That is the issue you are going to have to be concerned with. Well, first of all, it means that their wives can be prosecuted for the charges that are now pending against them, Perna's wife, Verzino's wife, if they lie. The deal is off. They can be prosecuted on those charges. If they testified truthfully, the charges against their wives are dismissed.

The second part of that agreement, they can be prosecuted for all the crimes they have admitted to the Government."

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* The only objection to these remarks was Alaimo's and Joe Stassi's contemporaneous objections to this passage, and neither of them raised the point now urged on appeal. Instead, Joe Stassi argued characteristically that the prosecutor's argument about truth "should be [phrased] 'in the opinion of the Government,'" and Alaimo that "[t]here was no such agreement with Mastantuono." (Tr. 3669). The failure to raise a pertinent objection not only constitutes a waiver, but is also demonstrative of the lack of prejudice inherent in the remarks now complained of. See *United States* v. *Canniff*, 521 F.2d 565, 572 (2d Cir. 1975), *cert. denied*, 96 S. Ct. (1976).

After adverting briefly to the practical significance to Perna and Verzino of such a prosecution, the prosecutor turned to the "real threat" against the accomplices and made the second argument to which objection is now made (Tr. 3670-71):

> "But the real threat to them, and they know it, is [if] they get up here and frame somebody and lie and perjure themselves and they are sentenced by the Court, what do you think the Court is going to do? Give them a break? Show them leniency? Do they want the Court to know that instead of cooperating, they simply got up on the stand and lied and framed and perjured themselves? Will that help them?
>
> And it is the sentencing Judge, ladies and gentlemen, that makes the decision as to what their sentence will be, whether they will receive the maximum or whether they will receive less. The Government does not sentence these witnesses; the Court does. Obviously, they hope they will receive the most lenient sentence they can receive under the law. But that decision isn't in the hands of the Government; it is not in their hands; it is in the hands of the Judge. And, obviously, they know that the Court will be influenced by whether or not they have been shown to have perjured themselves, rather than told the truth when they cooperated with the Government."

Clearly none of this was improper summation. The agreements were "merely one of many items to bear upon the question" of the accomplices' credibility, and the prosecutor was fully entitled to refer to them. *United States* v. *Aloi*, 511 F.2d 585, 598 (2d Cir.), *cert. denied*, 44 U.S.L.W. 3344 (1975); *United States* v. *Koss*, 506 F.2d 1103, 1111-13 (2d Cir. 974), *cert. denied*, 421 U.S.

911 (1975). See also *United States* v. *Isaacs*, 493 F.2d 1124, 1165 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974). There was no "impermissible Government voucher" for the accomplices' credibility inherent in the promise "to bring [their] cooperation to the attention of the sentencing judge" or the threat to prosecute them "if [they] testified falsely." *United States* v. *Araujo*, *supra*, slip op. at 5104. There is not here any statement or insinuation that the prosecutor had information supporting credibility which the jury did not have. See *United States* v. *Hysohion*, 439 F.2d 274, 277-78 (2d Cir. 1971). And, as he did in *Aloi*, Judge Knapp properly presented the question of credibility to the jury (Tr. 238, 3946-51, 3975, 3981-82).*

C. The Government's Rebuttal Summation Was Entirely Proper, And, In Any Event, Was A Fair Reply To The Defense Summations.

Joseph Stassi and Anthony Stassi (but evidently not Sorenson) attack the Government's rebuttal summation. As that rebuttal was a response to the accusations of frame-up and perjury contained in the defense summations, the claim of error is best assessed after a review of the defense summations.**

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* When the agreement was received, Judge Knapp properly instructed the jury that "it has nothing to do with the guilt or innocence of these defendants" and is "laid before you as to the value you think" it has "to you in judging the truth or lack of truth of this witness' testimony." (Tr. 238).

The cases on which appellants rely, *United States* v. *Drummond*, 481 F.2d 62 (2d Cir. 1973), and *United States* v. *Phillips*, 527 F.2d 1021 (7th Cir. 1975), are so factually remote as not to merit discussion.

** The prosecutor explicitly exempted Sorenson from the response (Tr. 3914), even though Sorenson had argued that government agents had suggested the substance of accomplice testimony (Tr. 3772) and that the accomplices had falsely "put him in" the conspiracy. (Tr. 3774-75).

1. Anthony Stassi's Summation

The mi-leading fragment of Tony Stassi's trial counsel's summation, quoted in his brief (A. Stassi Br. at 68-69), fails to disclose the accusations of frame-up and perjury, and prosecutorial complicity, with which the complete summation abounds. (Tr. 3786-3852). It was, as Judge Knapp correctly observed at sentencing, a calculated effort to "challenge the integrity of the prosecutor and the prosecution without permitting him to answer the challenge." (Tr. 4042).

Tony Stassi's brief falsely states that "[a]t no time during appellant's summation did he ever accuse the Government of any misconduct", and quotes most of the following fragment in an effort to prove that:

> "Now, the same thing about the honor dormitory. Mr. Nesland admitted that there was a discrepancy between Perna and Verzino on the honor dormitory conversation. Verzino said he tried to reach Bubby by letter, and there is another instance Mr. Nesland glossed over. Verzino says it was on the outside, not by letter. This is a frame job—f-r-a-m-e. I am not afraid to say that. That is the name of the game. I am not saying he participated in it; I am saying they did. He is a zealous prosecutor; he does his job. The problem is he ain't got nothing to work with that is any good. His case is made up of nothing but stool pigeon testimony. It is not worthy of belief."
>
> (A. Stassi Br. at 68-69) (Tr. 3808-09).

This was in fact accusation by innuendo, since a jury could not help but understand the argument as being that the Government, including the *zealous prosecutor*, had "participated" in "the game" even though counsel was "not saying" that they did.

Counsel was not always so subtle in his accusations. In addition to the ever present suggestions about what "Mr. Nesland glossed over", he quite clearly contended that the prosecutor himself had tampered with the testimony of the witness Ouimet:

> "Now, another gloss over by Mr. Nesland in his closing argument was about Danielle Ouimet going to Florida to see Mr. Felix. Do you remember that? He just passed over it. No word that she went to see the recipient. Instead, he argues to you it was another French intermediary like Andreani. But you remember Miss Ouiment's testimony on cross-examination. You remember when she was asked the question, 'Wasn't he the recipient?' She says, 'Yes.' Now, she understood perfect English: I didn't have to use an interpreter; she is bilingual; she obviously knew the import of the question and answered, 'Yes, he was the recipient.' Mr. Nesland knew what the word meant, because in his closing argument he used that word, that is the way he used that word, and I used the word and Danielle used the word. But then there was a recess. Mr. Nesland went out the door with Danielle. They came back in. The next question was asked, 'Was it the buyer'?
>
> "No.'
>
> I mean, really. She knew what Mr. Nesland wanted to hear. She had just pled guilty to an information; she had it hanging over her head. I am not saying it was in bad faith. He just asked the question. But she could tell, she could deduce from his attitude, from what happened in the courtroom, from the dynamics of what had happened, she knew she had given an answer that was not satisfactory to the government. So she changed

> it. But the truth is what came out first. That was the truth. She was told and she knew and she believed that the man she met in Miami was the recipient, was the buyer." (Tr. 3812-13).

These remarks should also be viewed in light of a later remark about what "Mr. Nesland said after squirming and twisting and bringing the fog back in again." (Tr. 3824).*

Much of the remainder of the summation was devoted to arguments that various witnesses had perjured themselves so that they could tell the Government what it wanted to hear. (*E.g.*, Tr. 3829-3830, 3834, 3842, 3844, 3845, 3847, 3848, 3852). Typical of these remarks is the following (Tr. 3820-21):

> "Mario Perna said [*sic*] up on the witness chair right here and told you he lied to his wife, lied to his girlfriend, lied to his probation officer. There was nobody the man did not lie to. Oh, yes, there was one person he forgot to tell you about that he lied too. You know who that is before I say it to you—Jimmy Nesland. He forgot to tell you that he lied to Jimmy Nesland. And you knew that the only way that a man can get indicted for perjury is if these people at Table 1 do it. That is a better position to be in, at that table."

Of course, the argument that these witnesses were such blatant and well-rehearsed liars carried with it the clear suggestion that what was so obvious to the defense must have been equally obvious to the prosecutor.

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* "Squirming and twisting" were terms reserved for those occasions when Stassi's counsel claimed he had caught a witness in a lie, who then "squirmed" his way out. (E.g., Tr. 3818).

2. Joseph Stassi's Summation

Joseph Stassi's summation (Tr. 3854-3913) continued where his brother's attorney left off, posing the "central issue" as whether the witnesses were "worthy of belief" (Tr. 3855) in ight of "a phrase in an agreement that was put together to be a part of this situation—what is the government's opinion of me" (Tr. 3857) and building an argument of frame-up and perjury.

His argument began with a claimed Government inducement to Mastantuono to pick "somebody the Government would bite on" from among "some Italian Americans" he "was shown" because Mastantuono had to "name somebody to make" himself "important" if he was to get out of jail. (Tr. 3861-62). He further argued that when Condello was caught, he figured out "what was desired" (Tr. 3862-63). So, he continued, Condello spoke to Perna (Tr. 3863); Perna spoke to Verzino (Tr. 3864); and together they concocted a story as the "message [became] clear . . . as to what the Government wanted." (Tr. 3866). Each of them, counsel claimed, was a "pliable witness" who would "fit into the mold." (Tr. 3869). And then, in almost the same language as Tony Stassi's counsel, Joe Stassi's attorney capped his accusation of frame-up with the following remarks (Tr. 3869-70):

> "That's a red flag to you. That's a red flag that tells you you should look back over at this square thing we are trying to shove together and see if it comes from the same position of suspicion. I am not saying the Government got down and just planned this thing. But I am saying that they let it happen and they want to see the answers that come forward. They want to take all the little facts and they searched high and low for any kind of creature that could come forward and add a little chip to force that peg through that hole. All they got were these three unworthy individuals.

> So what does Mastantuono know? He says there are two shipments at a certain time. You can assume that when Mr. Condello—he says there is one shipment that had Stassi in it back in '73 when Bradley is dealing with Condello. But the existence of the indictment, the existence of the fact that Stassi is a suspect, you remember what Bradley said about when he said he talked to Condello. His exact words were, ladies and gentlemen, I told him, I know you know about Anthony Stassi's narcotics involvement. It doesn't take a genius to figure it out.
>
> Yes, I know. You told me so. It is as simple as that. That's the way it happens and the outlines of the stories of Perna and Verzino that were put together obviously they haven't been allowed now to get back together and just work it up in face-to-face conversations.
>
> But the Government is going to participate in that. But whether zealous agents, in friendly conversations with their pals that they have worked up into their witnesses, and others communicating back and forth can put this ragged skeleton together, there is no question that can happen. So the capacity for it to happen, the motivation for it to happen, the personalities who would execute it all exists. And they are not incredible."

Like his brother, Joe Stassi is claimed not to be saying that the Government—including "zealous agents, in friendly conversations with their pals that they have worked up into their witnesses"—"just planned this thing," but rather only "that they let it happen" and "want to see the answers that come forward" so much that "they searched high and low for any kind of creature that could come forward and add a little chip to force

that peg through that hole." These remarks, however, amount to a transparent accusation that the Government framed Joseph Stassi, especially when the theme was repeated as it was (Tr. 3872-73, 3877-78, 3879, 3884, 3885, 3888, 3897), and the summation concluded with a statement to the jury that "'that's all you have here, bought testimony." (Tr. 3912).

3. The Government's Rebuttal Summation

The essence of the attack on the Government's rebuttal summation (Tr. 3914-34) is that the prosecutor vouched for the Government's witnesses (*e.g.*, A. Stassi Br. at 65, 66; J. Stassi Br. at 42-43). In fact, the prosecutor did no such thing, and his rebuttal summation was well within the bounds of fair reply to the attacks made on the Government's witnesses. See *e.g.*, *Lawn* v. *United States*, 355 U.S. 339, 359-60 (1958); *United States* v. *Alfonso-Perez*, Dkt. No. 75-1395, slip op. 3761, 3768-3769 (2d Cir., May 17, 1976); *United States* v. *Tramunti*, *supra*, 513 F.2d at 1119; *United States* v. *Santana*, 485 F.2d 365, 379 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974); *United States* v. *Brawer*, 482 F.2d 117, 133-34 (2d Cir. 1973), *cert. denied*, 419 U.S. 1051 (1974); *United States* v. *Buckner*, 108 F.2d 921, 928-29 (2d Cir.), *cert. denied*, 309 U.S. 669 (1940). In any event, no pertinent or timely objection was taken to the challenged portions of the rebuttal summation (*supra*, p. 89).

The first fragment quoted in Anthony Stassi's brief (p. 66)* is utterly unobjectionable as a response to an

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* The critical portion of the prosecutor's summation is as follows:

> Who is doing it? Do you believe that? Did they ever tell you that Tony Bocchichio was suborning perjury or Mr. Sear and myself when we were questioning these people long ago and you heard them testify that hour after hour

[Footnote continued on following page]

attack on the Government's witnesses, whether it is considered in isolation or as part of the prosecutor's larger response to the charge of frame. (Tr. 3914-18). The language about preparing witnesses is a particularly appropriate response to Joseph Stassi's charge that "zealous agents" have used "friendly conversations with their pals" and "worked [them] up into their witnesses." (Tr. 3870).

The next fragment and the argument surrounding it (A. Stassi Br. at 67; J. Stassi Br. at 43)** is evidently meant to suggest that the rebuttal summation was struc-

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we spent preparing them. Of course, they prepare their witnesses, we prepare ours. Were we suborning perjury, suggesting to them how to come in here and put the whole thing together?

That's what they are saying. Talk about gloss. Why don't they say it like it is? That's why they are saying. Zealous agents, zealous prosecutors, certain you are zealous when you enforce the law, but to suborn perjury, to bring these witnesses in here and to suggest to them time and again, no, you have got to say this, you have got to say that, you have got to have that meeting. Those witnesses were put on the stand and they testified to the events that they were telling the Government long ago when they had never talked to each other.

** This portion of the prosecutor's summation read as follows:

They claim that the government is guilty of subornation of perjury. What else would one say when all the evidence is against you, as it is against Joseph Stassi and Anthony Stassi and Bobby Sorenson. You can't for the life of you show how those witnesses can tell the same story unless you say it is a frame.

* * * * *

The defendants have to say this, because it is either the truth or it is a frame. The problem they have is there is no way in this case to prove that these witnesses got together and framed them; so try the government; the government did it. Well, I submit to you that is ridiculous and it is obviously ridiculous (3924-25).

tured "in such a way as to suggest to the jury that if it would vote for acquittal it would be implicitly agreeing with the defendants' insinuations that the prosecution had 'framed' the defendants." *United States* v. *LaSorsa*, 480 F.2d 522, 526 (2d Cir.), *cert. denied*, 414 U.S. 855 (1973). If so, here as in *LaSorsa* "the prosecution was only meeting the defense on a level of the defense's own choosing" (*ibid.*), and the response was perfectly proper. See *United States* v. *Benter*, 457 F.2d 1174, 1176-77 (2d Cir.), *cert. denied*, 409 U.S. 842 (1972). Certainly this is not a case like *United States* v. *Spangelet*, 258 F.2d 338 (2d Cir. 1958), on which Tony Stassi relies, or *United States* v. *Phillips*, 527 F.2d 1021 (2d Cir. 1976), on which Joe Stassi relies. In *Spangelet* the prosecutor, unlike the case here, referred to unsworn factual material outside the record. 258 F.2d at 342-43. In *Phillips*, the prosecutor's remarks misstated the law and very possibly misled the jury about what it would have to find before it could acquit. 527 F.2d at 1022-23.*

There is not the slightest impropriety in the next fragment quoted in Anthony Stassi's brief (p. 68),** nor

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* Appellants also appear to contend that the prosecutor's rebuttal argument based on the cooperation agreements constituted improper vouching for the witnesses' credibility. (A. Stassi Br. at 67-68; J. Stassi Br. at 42). This argument is, as discussed more fully earlier, foreclosed by *United States* v. *Araujo*, *supra*, and by *United States* v. *Aloi*, *supra*. See pp. 90-93, supra.

** The criticized remarks are quoted as follows:

> Now, they want you to say don't rely on those witnesses. Don't rely on those witnesses.
>
> Why does defense counsel say that? Because they have got a deal. They got a gun at their heads. Is that gun pointed at their head, one that makes them lie or one that makes them tell the truth. The truth is the only way out for Mario Perna. The truth is the only way out for

[Footnote continued on following page]

any warrant for his invitation to this Court to "deter" the Government from the response his own summation—not as he suggests that of "other counsel" who "might have opened the door" (p. 69)—invited and provoked. Compare *United States* v. *Drummond*, 481 F.2d 62 (2d Cir. 1973) (prosecutorial misconduct), with *United States* v. *DeAngelis*, 490 F.2d 1004, 1011 (2d Cir.) (Mansfield, *J.*, concurring), *cert. denied*, 416 U.S. 956 (1974) (defense misconduct).

D. Conclusion

The appellants have attempted to turn this trial of men whose guilt was overwhelmingly established into a trial of Government counsel. This tactic, which has become commonplace, has rarely been based on such utterly insubstantial foundations.

Anthony Verzino, and it is the easiest way out. If you tell the truth and the Government tells them, tell the truth. Not to manufacture a bunch of garbage. If they lied, if they deliberately lie and frame people, the deals are off. But when they are sentenced and when they are sentenced, it won't be by the Government. It is going to be by the court. The court alone and the court will be told what these witnesses have done. They know that. That's what their deals require that the court be told all the crimes they have done (3921-22).

POINT VII

It Was Not Error For The Trial Court To Request The Jury To Find Whether Appellants Became Members Of The Conspiracy Before May 1, 1971.

Joe Stassi's claim that Judge Knapp erred in requesting the jury to specifically find whether any defendant became a member of the conspiracy prior to May 1, 1971 requires little discussion.

The indictment charged the defendants with a conspiracy to violate the Federal narcotics laws between January 1, 1970 and December 30, 1972. As a matter of law, prior to May 1, 1971, the conspiracy violated Title 21, United States Code, Sections 173 and 174 (the old law), and after May 1, 1971, the conspiracy violated Title 21, United States Code, Sections 812, 841, 846, 952 and 963 (the new law).

Since the old law sections and the new law sections differ substantially in terms of punishment,* and violations of the old law sections are to be punished thereunder, see *Warden* v. *Marrero*, 417 U.S. 653 (1974); *Bradley* v. *United States*, 410 U.S. 605 (1973), the trial court was obliged to require the jury in returning a guilty verdict to make a special finding of whether a defendant they found guilty of the conspiracy joined the conspiracy before or after May 1, 1971. To meet that obligation, Judge Knapp provided the jury with a verdict form which set forth Counts One through Five, asked for a verdict of guilty or not guilty as to each count for each

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* Under the old law, mandatory minimum periods of imprisonment are to be imposed. That is not the case under the new law.

defendant, and then concluded with the challenged paragraph:

> "In the event of a guilty verdict on Count 1 (conspiracy) answer the following question: Did the defendant become a member of the conspiracy before or after May 1, 1971? (Before ——— After ———)."

Whether denominated a special verdict or a special finding, Judge Knapp's request to the jury to answer that single question is in accord with the accepted practice in this Circuit, at least since *United States* v. *Ogull*, 149 F. Supp. 272 (S.D.N.Y. 1957), *aff'd sub nom. on other grounds*, *United States* v. *Gernie*, 252 F.2d 664 (2d Cir.), *cert. denied*, 356 U.S. 968 (1958).* In *Ogull*, not unlike the facts here, defendants were charged with a conspiracy to violate the Federal narcotics laws. During the period encompassed by the conspiracy the narcotic laws were amended; the amendments increased the penalty applicable to the latter part of the conspiracy, thus requiring a factual determination of whether defendants were members of the conspiracy after the effective date of the amendments in order for the trial court to impose sentence under the amended statute. Judge Palmieri refused to make that determination and submitted the question to the jury, reasoning:

> ". . . I am faced with a situation in which it is my duty to consider sentences under the provisions of a new statute. However, I cannot constitutionally make the factual determination that is a con-

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* Requesting special findings is not limited, of course, to narcotics cases. See, *e.g.*, *United States* v. *McCracken*, 488 F.2d 406, 418-19 (5th Cir. 1974); *United States* v. *Sobell*, 314 F.2d 314, 330 (2d Cir. 1963).

> dition precedent to its application. The appropriate arm of the court for this purpose is the jury, and history and common sense authorize it to perform this function." *Id.* at 278-79.

Offering no practical alternative to Judge Knapp's similar submission of the instant issue to the jury for its determination,* Joe Stassi contends that requesting the jury to make that special factual finding over and above its duty to make a general factual finding of guilt "violated the ruling in *United States* v. *Spock*, 416 F.2d 165 (1st Cir. 1969)." (J. Stassi Br. at 33). Stassi's reliance on *Spock* as support for his contention is misplaced.

First, the Court in *Spock* carefully distinguished its condemnation of the special findings requested there from the special findings authorized in *Ogull*. The ten special findings the trial court requested the jury to make were not, as in *Ogull*, an essential condition to the trial court's later obligation to impose sentence. 416 F.2d at 182 n.41.** Here, as in *Ogull*, it was essential for the jury to determine whether appellants joined the conspiracy before May 1, 1971 in order for Judge Knapp to impose sentence under Sections 173 and 174.***

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* Stassi offers an impractical alternative. He suggests that in cases where the conspiracy violates both the old law and new law sections, the Government should charge the conspiracy in two separate counts. Aside from the obvious confusion that such a technicality would generate for the jury, it is a rare defendant indeed who would not protest that the Government's filing of an indictment charging two counts, where one count would suffice, was either multiplicitous or unfair.

** Indeed, the Court in *Spock* grounded its reversal on its finding that the trial court had "no significant reason" for requesting the jury to return special findings. 446 F.2d at 183.

*** In the other case cited by Stassi, *United States* v. *Gallishaw*, 428 F.2d 760 (2d Cir. 1970), this Court expressly recognized the "unique" need in cases like *Ogull* to request the jury

[Footnote continued on following page]

Second, the Court's fear in *Spock* that the making of special findings might exert pressure upon the jurors to reach a guilty verdict is simply not a factor in the instant case. In Judge Knapp's submission of the special charge to the jury to obtain jury clarification of facts essential to the choice of sentence, he did not require the jury to reveal bases for its deliberation nor did he in any way fetter the role of the jury. Judge Knapp's charge specifically required the jurors to reach a verdict of guilt or innocence on Count One, the conspiracy count, *before* they turned their attention either to Counts Two through Five or to the question when appellants became members of the conspiracy.

Moreover, even were we to accept appellant's position that submission of special findings to the jury is not the preferred practice, as none of the traditional dangers associated with special verdicts are here present, at most harmless error has been committed. *United States* v. *James*, 432 F.2d 303, 307-08 (5th Cir. 1970), *cert. denied*, 403 U.S. 906 (1971).

Finally, unlike the defendants in *Spock* who objected to the trial court's request for special findings, appellants, as in *Oguli*, made no objection below.* The court in

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to make a special finding, and it further recognized that the need for a special finding such as in *Ogull* was "clearly distinguishable" from the situation in *Spock*. 428 F.2d at 765.

Further, in situations where the jury must specify the facts of its disposition so that the court may impose one of two possible penalties, special findings are an accepted practice "in order for the court to determine what penalty to impose." *United States* v. *Simon*, 186 F. Supp. 223, 228 (S.D.N.Y. 1960); *Williams* v. *United States*, 238 F.2d 215 (5th Cir. 1956), *cert. denied*, 352 U.S. 1054 (1957).

* Stassi cannot claim lack of notice. At the very outset of the trial, the Government and Judge Knapp informed defense counsel that the jury would be requested to make the special finding now complained of. (Tr. 521). Further, Judge Knapp provided defense counsel with copies of the form of the verdict before it was finally presented to the jury. (Tr. 3596-97).

Spock expressly recognized that the failure to object to a trial court's decision to request special findings waives any alleged error. 416 F.2d at 183.

POINT VIII

Judge Knapp Properly Charged The Jury Under *Pinkerton* Regarding Joe Stassi's Legal Responsibility For Substantive Offenses If Found To Be A Member Of The Conspiracy.

Joe Stassi claims that Judge Knapp's charge to the jury on the conspiracy, which relied upon the legal theory enunciated in *Pinkerton* v. *United States*, 328 U.S. 640 (1945), erroneously foreclosed the jury from acquitting him of the substantive violations alleged in Counts Two through Five. Judge Knapp's charge correctly stated the law under *Pinkerton* and did not preclude the jurors from acquitting Stassi of one or more of the substantive violations if they were to have concluded on the evidence that Stassi was either not a member of the conspiracy or, if a member, would not have reasonably forseen that the substantive violations alleged in Counts Two through Five would result from the conspiratorial agreement.*

With respect to Joe Stassi's responsibility for substantive violations under a *Pinkerton* theory, Judge Knapp charged:

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* Joe Stassi's claim is made in Point II of his Brief. Like his claim regarding Judge Knapp's request for a special verdict made in Point I of his Brief, his claim here attacking Judge Knapp's *Pinkerton* charge was not the subject of objections below, despite the fact that Judge Knapp early in the trial gave defense counsel copies of his *Pinkerton* charge in *United States* v. *Vidal*, 73 Cr. 994, and indicated his intent to give the same charge in the instant case.

"Turning to the other crimes alleged in the indictment, which, as I have said, you may only consider as to any defendant whom you may have found guilty of conspiracy, the law is quite simple. The law provides that when an unlawful act is done in furtherance of a conspiracy by one of several co-conspirators each conspirator is as guilty of performing the act as the person who actually does the deed.

I charge you as a matter of law that the wilful importation of importation [sic] as alleged in Counts 2 and 4, and the wilful possession of heroin with the ultimate intention of distributing the same, as alleged in Counts 3 and 5, constitute violations of the statutes of the United States. So if you find that any defendant was a wilful member of the conspiracy and had become so before those crimes are alleged to have been committed and that Mastantuono was also a member thereof and imported and possessed the heroin in the manner charged in the counts I just mentioned, and did so in furtherance of the conspiracy, and that such conduct was reasonably foreseeable by the particular defendant whose guilt you are considering, *you may convict such defendant of any or all of Counts 2, 3, 4, and 5.*" (Tr. 3972-73) (emphasis added.)

This instruction was in complete accord with the recently reaffirmed theory of vicarious liability articulated in *Pinkerton*. See *United States* v. *Finkelstein*, 526 F.2d 517, 522 (2d Cir. 1975); *United States* v. *Aloi*, *supra*, 511 F.2d at 600.

Furthermore, contrary to Stassi's assertion, the italicized portions of the charge reflect that Judge Knapp left

ample room for the jury to acquit Stassi on one or more of the substantive counts had it made the unlikely finding that the evidence against Stassi did not warrant a guilty verdict.

POINT IX

Judge Knapp's Conduct Of The Trial Did Not Prejudice The Appellants.

All appellants claim to have been prejudiced by Judge Knapp's conduct of their trial and assert that he showed partiality towards the Government and hostility towards the defense (J. Stassi Br. at 40-41; A. Stassi Br. at 59-65; Sorenson Br. at 41-42). In the case of Joe Stassi and Sorenson, the attack is limited to a remark Judge Knapp made which included the statement, "The jury knows that the prosecution thinks your clients are guilty or they would not have brought the case." (Tr. 1164). Tony Stassi's attack embraces, in addition, a baker's dozen of other instances of claimed judicial misconduct. Appellants received an utterly fair trial completely free of judicial bias against them, as even a cursory review of the record establishes, and their contrary claims are frivolous.

A. Judge Knapp's Remark About The Prosecution's Belief

Joe Stassi's and Sorenson's briefs do not quote Judge Knapp's remark. Anthony Stassi's brief quotes it, but after characterizing it as "Perhaps the most offensive of the court's remarks", artfully distorts the context in which it occurred (A. Stassi Br. at 63). The challenged

remark and the full context in which it occurred are set forth in the margin.*

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* During the examination of Agent Bradley, the following occurred, including the challenged remark which we have italicized (Tr. 1162-1165):

"Q. To the best of your recollection, Mr. Bradley, tell the Court and jury what you recall Mr. Perna first telling you and put it in his words as close as you can.

"A. I first spoke to him regarding this matter during that time period. I stated to him that I knew he was familiar wih Anthony Stassi and his narcotic dealings——

"Mr. Garland: Objection to what he stated.

"The Court: Well, you can't have a conversation unless he started it. Obviously all that is relevant to what Perna told him, but you can't have a conversation with only half of them.

"Mr. Garland: I think it is relevant also what Mr. Bradley told Mr. Perna prior to the interview.

"The Court: I ruled in your favor. Don't argue.

"Q. [sic] I stated to Mr. Perna that I knew that he was aware of the narcotic activity of Anthony Stassi.

"Mr. Garland: May I just make clear this up. I don't think I made my objection clear. I want to state my grounds. I object on the basis that the investigating statements of this witness, any probative value they have is far outweighed by prejudicial nature of the self-serving conclusions of the mind of the witness. Therefore, this should come in, did he ask him a question concerning the subject matter, not his assertion about this that any other thing.

"Then he can state, yes, what did the man say.

"Mr. Naden: I would like to make my client's position clear for the record also. I think the agent's statement will tend to influence the jury merely because——

"The Court: *The jury knows that the prosecution thinks your clients are guilty or they wouldn't have brought the case. The question is whether the prosecution's belief is correct. It is merely telling him the agent thinks he's got a case. It isn't something they don't know.*

[Footnote continued on following page]

The defense arguments concerning the remark are disingenuous.

In the first place, the Court's remark never "added the Court's position to the Government's case." (J. Stassi Br. at 40). Nor did it place "the integrity of the . . . court directly behind the credibility of" any government witness, much less "each and every Government witness." (A. Stassi Br. at 63). The remark addresses the prosecution's belief in the defendants' guilt,

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"Mr. Garland: May it please the Court, it's been testified to there were two weeks of conversations on the subject matter for approximately an hour each. If the witness is going to attempt to put in what he said in this fashion, it becomes highly prejudicial unless he knew a question and answer.

"The Court: Then he can't.

"Mr. Garland: He shouldn't state the kind of representation he made at the time. It becomes a trial by his conclusion. It is not necessary to get the evidence in, your Honor.

"The Court: I disagree with you. Overruled. Proceed.

"A. I stated to Mr. Perna that I knew he was aware of the narcotic activity of Anthony Stassi. I stated to him that Mr. Stassi, meaning Anthony, had been indicted regarding the importation of 40 kilograms of heroin. Mr. Perna at that time, he said, 'You are off on the figure of 40 kilograms of heroin.' The figure as he knew it to be was 120 kilograms of heroin. I said to him, 'How do you know this?' At that time he stated while he was incarcerated at Atlanta penitentiary, himself and Mr. Anthony Verzino had a conversation with one Jean Claude Otvos, a Frenchman also incarcerated there. Mr. Otvos was complaining about a narcotic transaction he had been involved in——

"Mr. Kadish: Objection on the ground of hearsay.

"Mr. Newman: I have objections on any conversations regarding Mr. Otvos, and I have noted continuously and I stated it previously.

"Mr. Kadish: I join in the objection."

and says nothing about the Court's belief. Obviously the prosecution should not prosecute where it does not believe there is guilt, *see Di Carlo* v. *United States*, 6 F.2d 364, 368 (2d Cir. 1925), and it is not necessarily improper to tell the jury that the prosecution believes its witnesses. *See Lawn* v. *United States*, 355 U.S. 339, 359 n.15 (1958). There was no suggestion that that belief was based on anything other than the evidence to be presented to the jury.

Second, the Court's remark was provoked by and is responsive to defense objections artfully blurred in Tony Stassi's brief that Agent Bradley's "self-serving conclusions . . . will tend to influence the jury." Having provoked the remark, appellants are hardly in a position to complain of it.

Third, even if appellants are not foreclosed from complaint on the ground just mentioned, the fact is that no contemporaneous objection was made to the remark, cf. Fed. R. Evid. 103, although it was surrounded by objections on other subjects. Not until the end of the Court day were mistrial motions based on the remark made. (Tr. 1180, 1186-87).

Fourth, the Court immediately cured whatever incorrect notion the remark might have conveyed to the jury by telling it that "[t]he question is whether the prosecution's belief is correct," and then gave extensive curative instructions the following morning. (Tr. 1201-07).

Fifth, even if the curative instructions were inadequate, whatever error may have inhered in the remark was clearly harmless in the context of this case. Credibility was clearly a central issue and was developed and argued extensively before being fully and correctly

charged to the jury. It is inconceivable that this brief passing remark which came during the course of a lengthy trial, could have affected the jury's verdict.

B. Other Incidents

Tony Stassi's recital of other incidents, many of which involve counsel other than his own, are most clearly and conveniently considered in the order in which they occurred at trial. Taken individually or together they show no prejudice against the appellants. See *United States* v. *Weiss*, 491 F.2d 460, 468-69 (2d Cir.), *cert. denied*, 419 U.S. 833 (1974).

1. Perna's Cross-Examination

Three incidents in Perna's cross-examination are challenged.

The first relates to colloquy concerning Perna's exposure to imprisonment. (Tr. 658-59) (A. Stassi Br. at 59-60). Simply to quote the full colloquy, as we do in the margin,* refutes appellant's argument. Judge

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* The colloquy, and the question that led to it, are:

"Q. And on the other side of that is you can get fifteen or twenty-five to life in your state court cases on top of that?

A. Yes, sir.

The Court: On top of ninety years?

Mr. Naden: Fifteen or twenty-five.

The Court: On top of ninety?

Mr. Naden: That could be the sentence, your Honor. It doesn't mean he could live three lives.

Mr. Nesland: I suppose it is possible, your Honor.

Mr. Naden: The question relates to Mr. Perna's state of mind.

The Court: State of mind doesn't seem very relevant

[Footnote continued on following page]

Knapp's robing room comments, which are distorted in Tony Stassi's brief, do not change that. (Tr. 674-76) (A. Stassi Br. at 60).

The second incident again quoted in Anthony Stassi's brief so as to distort what occurred, attacks the Court's comment which we have italicized:

> "Q. When you spoke to Mr. Viviano [*sic*, should be Viviani], is that when he was an Assistant U.S. Attorney or——
>
> A. No, sir.
>
> Q. This is when he was representing you?
>
> A. Yes.
>
> Mr. Nesland: I would object to that question. He knows better than to ask that question.
>
> The Court: Yes, you do know better than to do what you are doing. The fact that he was an Assistant U.S. Attorney has no place in this case.
>
> Mr. Naden: I asked him if he spoke to any Assistant U.S. Attorneys.
>
> Mr. Nesland: It is perfectly clear what you were doing.
>
> The Court: *You know it is perfectly clear and if you don't know you ought to know. Get on with the case and stop this backhanded stuff.*" (Tr. 664).*

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as to what's going to happen after ninety years.

Mr. Naden: Well, he may have nine lives, your Honor.

The Court: You are adding a new edge, I must admit." (Tr. 658-59).

* Anthony Stassi's brief also mis-cites this as being at page 644 of the transcript.

Obviously Sorenson's trial counsel was attempting to insinuate that Viviani had acted to aid the Government rather than his client, Perna. The Court's restrained comment on this improper defense conduct is irreproachable.

The third incident, which occurred at the end of Perna's cross-examination, involves Judge Knapp's comments to the jury on trial procedure and the right and duty of counsel to make and preserve objections. Again, the artfully placed ellipses in Anthony Stassi's quotation, both those that are indicated and those that are not, must be filled in to see how utterly unobjectionable Judge Knapp's remarks really were. (Tr. 683-85).

2. Condello's Cross-Examination

Two incidents during Condello's cross-examination are challenged. (A. Stassi Br. at 61). With both, an examination of the full context refutes appellant's argument. As to the first incident, the nature of the questions being asked, as well as the Court's comment on them, should be examined. (*See* Tr. 934-37 rather than only Tr. 936-37). As to the second incident, the events surrounding the comment objected to, and the fact that the comment occurred during a side bar conference out of the hearing of the jury, must be considered (*see* Tr. 941-46 rather than only Tr. 945-46).

3. Mastantuono's Cross-Examination

The half-dozen incidents challenged in Mastantuono's cross and re-cross, when read in their full context, are so clearly not prejudicial to appellants that no useful purpose would be served by discussing them in detail.

(See Tr. 2071-72; 2278 and 2332; 2286; 2311-12; 2400-01; 2605).*

4. The Remaining Incidents

The remaining incidents have even less merit than the frivolous ones already considered. (See Tr. 3015-16, 3234, 3236, 3287).

POINT X

Bradley's Allegedly False Accusations, Concerning A School Teacher Mistakenly Identified As A Narcotics Dealer And Wounded By Bradley Were Not Demonstrably False, Were Not Known By The Government To Be False, And There Was No Error In The Government's Failure To Disclose The Incident Out Of Which The Allegedly False Accusations Arose.

Sorenson contends that a new trial should be granted because the Government did not disclose information that Agent Bradley had been involved in the shooting of a school teacher misidentified as a narcotics dealer and had falsely accused the teacher of assault. This contention is without substance, since there has never been any showing that Bradley's accusation was demonstrably untruthful or that the Government knew it to be so.

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* There is no "request that the court not interject into . . . [Anthony Stassi's] cross-examination" at Tr. 229-30 (see Anthony Stassi Br., p. 62). Thus, we cannot comment directly on the incident to which that citation refers. Nothing in the brief, however, suggests that the incident referred to there was any more substantial than the other insubstantial incidents challenged.

Based solely upon an article in the February, 1976 issue of *Playboy* magazine, Sorenson moved after his conviction for a new trial claiming that the Government had withheld information that Bradley was the subject of an investigation by a Federal and a New Jersey grand jury in connection with his shooting of a school teacher misidentified as a narcotics dealer and had falsely accused the teacher of committing an assault. Stripped of *Playboy's* characterization of the incident,* the bare facts were that on February 28, 1974 Agents Bradley and Boccia attempted to stop an automobile driven by Carmine Riccia, a school teacher, whom the agents had mistakenly identified as a narcotics dealer. Instead of stopping, Riccia drove the vehicle after the agents, first knocking Boccia to the ground and then aiming the car towards Bradley. Bradley fired his gun, wounding Riccia in the head. Immediately afterwards, Riccia was charged with assaulting a federal officer.

In April, 1974, a Hudson County Grand Jury investigated the incident; and in April, 1975, a Federal Grand Jury in Newark also examined the matter. Neither grand jury filed charges against anyone, and the charges against Riccia were eventually dismissed. (Tr. 4087-95).

The only evidence Sorenson offered below to support his claim that Bradley's account of the shooting incident was false and that the prosecutor should have disclosed it was Riccia's version recounted in *Playboy* magazine. According to that version, which differs only in the sequence and not the occurrence of the events, Riccia was shot first and then his automobile lurched forward when his foot slipped off the clutch and struck the accelerator.

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* That the author of the *Playboy* article had a particularly slanted viewpoint is suggested by the title he gave to his article: "An American Gestapo." (Tr. 4088).

After listening to the representation of the Assistant United States Attorney * and defense counsel concerning this incident, the trial judge made short shrift of the defense arguments of error:

> "The Court: PLAYBOY Magazine has a constitutional right to publish. Is there anything further?" (Tr. 4095).

Sorenson's contentions are somewhat difficult to identify. He does not appear to seriously contend that the Government was obliged under the principles of *Brady* v. *Maryland*, 373 U.S. 83 (1963), to make a disclosure of the shooting incident simply because it had been the subject of two grand jury investigations.** Since both grand jury investigations had concluded months before the trial below, and charges had not been filed against Bradley or anyone else, it would be frivolous to suggest that the investigations were in any way relevant to show Bradley was motivated to ingratiate himself with the prosecution. *Cf. United States* v. *Alfonso-Perez*, *supra*, slip op. at 3771; *United States* v. *Miles*, 480 F.2d 1215, 1217 (2d Cir. 1973); *United States* v. *Bonanno*, 430

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* The Assistant advised Judge Knapp that he was aware of the shooting incident and the grand jury investigations but was unaware that assault charges had been filed at any time against the school teacher. (Tr. 4092-93).

Moreover, since the *Playboy* article was not published until February, 1976, three months after appellants' trial, no claim is made that the Government was on notice of its allegations that Bradley had falsely accused Riccia of assault.

** It is also somewhat unclear whether Sorenson makes a serious claim here that the incident should have been disclosed because it had a bearing on Bradley's ability to make an identification. Judge Knapp correctly rejected that claim below as irrelevant, because Bradley's identification of Sorenson was never contested. (Tr. 4089-90).

F.2d 1060, 1062 (2d Cir.), *cert. denied*, 400 U.S. 964 (1970).

What Sorenson appears to argue is that the Government was obliged to disclose the information because it was potentially relevant to impeach Bradley's trial testimony by showing that Bradley had falsely accused the school teacher of assault. That contention must fail for the simple reason that the prosecution had no knowledge of any falsity in Bradley's account and there is no proof that Bradley's account of the shooting was false. The mere fact that the grand jury did not indict Riccia does not support the conclusion that the grand jury disbelieved Bradley's account of the incident. Any number of reasons could have dissuaded the Federal Grand Jury from filing an indictment charging Riccia with assault on a federal agent, not the least of which may have been that Riccia was in the sympathetic position of being charged with assault on agents who had mistakenly identified him as a narcotics dealer and shot him. Moreover, even accepting as accurate *Playboy's* rendition of Riccia's version, the necessary premise to Sorenson's claim—that the Government is required to disclose as impeaching evidence a witness' statement about an incident totally unrelated to the witness' trial testimony, but inconsistent with someone else's version of that same unrelated incident and, therefore, arguably a falsehood—is simply unacceptable. Indeed, Sorenson cites no precedent nor is the Government aware of any which establishes that the Government in that kind of situation has any such obligation under *Brady*.

But even accepting the unprecedented proposition that the prosecutor should have investigated, discovered and disclosed Riccia's and Bradley's inconsistent versions of the shooting incident, it is clear that no *Brady* violation was suffered, since Sorenson would not have been able

to utilize Riccia's version to prove his allegation that Bradley had given a false account. While Federal Rule of Evidence 608(b) grants a trial judge limited discretion to permit cross-examination into instances of misconduct relevant to the witness' character for truthfulness, Sorenson does not pretend that cross-examination of Bradley would have elicited admissions from him that he had falsely accused Riccia of assault.* In that circumstance, Riccia could not have been called to testify, since Rule 608(b) expressly excludes extrinsic evidence to prove an alleged instance of misconduct to impeach a witness. See *United States* v. *Allende*, 486 F.2d 1351 (9th Cir. 1973), *cert. denied*, 416 U.S. 958 (1974).

Moreover, in these circumstances, *Brady* could not possibly be found to have been violated, since the "omitted evidence" could, by no stretch of the imagination, be found to have "create[d] a reasonable doubt that did not otherwise exist." *United States* v. *Agurs*, 44 U.S.L.W. 5013, 5017 (June 24, 1976). That Judge Knapp concluded that the "omitted evidence" did not alter his view of the defendants' guilt, was clearly evident when he re-

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* It is also likely that had Judge Knapp been confronted with the question whether under 608(b) any inquiry could be made of Bradley about the shooting incident, he would have exercised his discretionary powers to preclude questioning about it. This is so because all that cross-examination of Bradley would have accomplished would have been to inject into the trial a collateral issue of alleged misconduct, which the Government then would have had to dispel by calling other agents, including Boccia, to corroborate Bradley's testimony, thereby diverting the jury's attention away from the issues before them into a separate fact-finding venture as to whether Bradley's version of the shooting was true or false. In that circumstance, Judge Knapp could properly have excluded cross-examination of Bradley about this incident to avoid that distraction. See *United States* v. *Facelli*, 521 F.2d 135, 139 (2d Cir. 1974), *cert. denied*, 44 U.S.L.W. 3471 (Feb. 24, 1976).

sponded to the defense claim by simply asking defense counsel:

"Is there anything further?"

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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Form 279 - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

JAMES E. NEELAND being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 5th day of August, 1976 he served a copy of the within Brief by placing the same in a properly postpaid franked envelope addressed: Arnold S. Wallach, Esq.
11 Park Place
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Attorney for Joseph Stassi
Julia P. Heit, Esq.
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Ralph S. Rosen, Esq.
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Attorney for William Sorensen

And deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

James E. Neeland

JAMES E. NEELAND
ASSO. U.S. ATTORNEY

Sworn to before me this
5th day of August, 1976
Alma Hanson

ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24-6760450 Qualified in Kings Co.
Commission Expires March 30, 1978